United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

ORIGINAL 75-7343

[redacted]

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P/S

United States Court of Appeals

For the Second Circuit

CLARENCE O. GOKAY, JR., an infant, by his mother DOROTHY GOKAY, individually,

Plaintiff-Appellee,

against

MARC ANTHONY'S INC. d/b/a MARC ANTONIO'S RESTAURANT,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPELLANT'S APPENDIX.

BOWER & GARDNER
Attorneys for Defendant-Appellant
415 Madison Avenue
New York, N. Y. 10017
(212) 751-2900

LIPSIG, NAPOLI, SULLIVAN, MOLLEN & LIAKAKIS, P. C.
Attorneys for Plaintiff-Appellee
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New York, N. Y. 10007
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UNITED STATES COURT OF APPEALS
FILED
AUG 25 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 732-6978—1976

(9599)

PAGINATION AS IN ORIGINAL COPY

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DOCKET ENTRIES

July 3-75	Filed pltff's true copy of Order of Attachment filed 2-13-75 with marshal' return- served the following: Marc Anthony's Inc. d/b/a Marc Antonio's Restaurant- UNEXECUTED 4-15, 4-23 an St. Paul Mercury Insurance Co. by Dunett Reynolds on 4-9-75
July 09-75	Filed ANSWER of deft to the complaint. (JPC)
July 09-75	Filed deft. interrogs.
July 10-75	Filed pltff's notice of taking deposition of deft. on 7-22-75.
Aug. 13-75	Filed summons and affdvt. of service by an individual served: Marc Anthony's Inc. (Marc Antonio's Restaurant) by Marc Antonio on 5-31-75
Aug. 22-75	Filed pltffs' answers to interrogs.
09-19-75	Pre-trial conference held by CONNER, J.
12-05-75	PRE-TRIAL CONFERENCE HELD BY CONNER, J.
01-30-76	PRE-TRIAL CONFERENCE HELD BY CONNER, J.
02-20-76	Filed deft's affdvt. and notice of motion for an order to transfer to the USDC for the Middle District of Penna.
02-20-76	Filed deft's mmeorandum of law.
03-04-76	Filed deft's reply affdvt. of William A. Dubrowski to pltffs' affdvt. and in support of deft's motion to change the venue to the USDC for the Middle District of Penna.
03-04-76	Filed deft's reply memorandum of law.
04-23-76	Filed deft's supplemental affdvt. of William A. Dubrowski in support of deft's motion.
04-27-76	Filed pltff's affdvt. of Joseph P. Napoli in opposition to deft's supplemental affdvt.
04-30-76	Filed Memorandum and Order- Opinion # 44,392-- for the reasons stated, this Court concludes that, in the present case, the scales of fairness do not tilt so decidedly in deft's favor as to warrant transfer. Deft's motion is denied. So ordered- CONNER, J. (m/n)
05-12-76	Filed statement of agreed facts.
05-12-76	Filed pltffs' requests to charge.
05-18-76	BEFORE CONNER, J. Jury trial begun.
05-19-76	trial cont'd
05-20-76	trial cont'd
05-24-76	trial cont'd and concluded. Jury verdict for pltff. in the sum of $150,000.
6-10-76	✓ Filed Judgment #76,548-- that the pltffs. Clarence O. Gokay Jr. an infant by his mother Dorothy Gokay individually, recover of the deft. the sum of One hundred fifty thousand ($150,000.00) dollars and costs to be taxed. CONNER, J. Judgment entered 6-11-76 Clerk (m/n)
-22-76	Filed Bill of Costs as taxed in the sum of$ 2,568.56, in favor of pltff, as against defts., and docketed as Judgment #76,548
07-14-76	Filed deft's notice of appeal to the USCA from the Judgment entered on 6-11-76. Copy to: Harry H. Lipsig
7-14-76	Filed transcript of proceedings dated 5-18,19,20-76
8-9-76	Filed pltff's affidavit of Joseph P. Napoli in support of motion for summary judgment, et
8-9-76	Filed pltff's trial memorandum of law.
8-9-76	Filed Plaintiff's memorandum of law.

BEST COPY AVAILABLE

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

- -X

CLARENCE O. GOKAY, JR., an infant, by his mother DOROTHY GOKAY, individually,

Plaintiff-Appellee,

-against-

MARC ANTHONY'S INC. d/b/a Marc Antonio's Restaurant,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

- -X

DOCKET ENTRIES.

DATE	PROCEEDINGS
Oct 28-74	Filed Complaint. Issued Summons.
Nov.21-74	Filed defts memorandum of law.
[illegible]3-74	Filed affdvt.of Dorothy Gokay in support of motion for order of attachment.
Dec. 16-74	Pre-trial conference held by -CONNER, J.
[illegible]. 2-75	Filed pltffs' memorandum of law.
Feb. 13-75	Filed Memorandum-Opinion #41873 and Order- for the reasons stated ,pltff's motion for an order of attachment is hereby granted, So ordered- CONNER, J. (m/n
Feb. 13-75	Filed Order of Attachment- that the pltff's undertaking be fixed in the sum of $5,000, of which amount the sum of $4950.00 is conditioned that the pltffs. will pay to the deft. all legal costs and damages which may be sustained by reason of the attachment, etc. as indicated- that the Marshal levy at any time before final judgment upon the contractual obligation of St. Paul Mercury Insurance Co. under a policy issued to said deft. Marc Anthony's Inc. d/b/a Marc Antonio's Restaurant for the purpose of satisfying any judgment that may be obtained by pltffs. etc. as indicated. CONNER, J. (m/n)
May 13-75	Filed summons and return-UNABLE to serve: Marc Anthony's Inc d/b/a/ Marc Antonio's Restaurant- 4-15-75, 4-28-75
[illegible]9-75	PRE-TRIAL CONFERENCE HELD BY CONNER. J.
[illegible]14-75	PRE-TRIAL CONFERENCE HELD BY CONNER. J.
May 22-75	Filed Order appointing Wilbur Mullazan to serve process on deft. Clerk
June 24-75	Filed pltff's notice for discovery and inspection.
June 24-75	Filed pltff's notice of taking deposition of deft. on 7-7-75.

SUMMONS.

SUMMONS IN A CIVIL ACTION

CIV. 1 (2-64)
(Formerly D. C. Form No.45a Rev. (6-49))

United States District Court

FOR THE

JUDGE CONNER

SOUTHERN DISTRICT OF NEW YORK

74 Civ. 4577

CIVIL ACTION FILE NO. _____

CLARENCE O. GOKAY, JR., an infant, by his mother DOROTHY GOKAY, individually,

Plaintiff s,

v.

MARC ANTHONY'S INC. d/b/a MARC ANTONIO'S RESTAURANT,

Defendant

SUMMONS

SUMMONS

To the above named Defendant :

You are hereby summoned and required to serve upon HARRY H. LIPSIG, ESQ.,

plaintiff's attorney , whose address 100 Church Street, New York, New York 10007,

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

RAYMOND F. BURGHARDT,
Clerk of Court.

E. A. Duclene
Deputy Clerk.

Date: October OCT 18 1974

[Seal of Court]

NOTE:—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

COMPLAINT.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CLARENCE O. GOKAY, JR., an infant, by his mother DOROTHY GOKAY, individually.

Plaintiffs,

-against-

MARC ANTHONY'S, INC. d/b/a MARC ANTONIO'S RESTAURANT,

Defendants,

C O M P L A I N T

Plaintiffs, by their attorney, HARRY H. LIPSIG, complains:

FIRST CAUSE OF ACTION

1. At all times hereinafter mentioned, the infant plaintiff, CLARENCE O. GOKAY, Jr., resided at 4 Wright Street, Port Jervis, New York.

2. Upon information and belief, at all times hereinafter mentioned, defendant, Marc Anthony's Inc. d/b/a Marc Antonio's Restaurant (hereinafter referred to as Marc Anthony's Inc.) was and still is a foreign corporation with its place of business in Milford, Pennsylvania.

3. Jurisdiction is founded upon diversity of citizenship and the amount in controversy, exclusive of interest and costs exceeding the sum of Ten Thousand ($10,000.00) Dollars.

COMPLAINT

4. Upon information and belief, at all times hereinafter mentioned, the defendant, Marc Anthony's Inc. was and still is the owner of the Marc Antonio's Restaurant.

5. Upon information and belief, at all times hereinafter mentioned, the defendant MARC ANTHONY'S INC., managed, maintained, operated and controlled the restaurant at the aforementioned premises.

6. Upon information and belief, at all times hereinafter mentioned, the defendant, MARC ANTHONY'S INC., its servants, agents, or employees maintained, controlled and supervised the aforesaid restaurant.

7. On or about the 17th day of June, 1973 at about 1:00 P.M. of that day, while the infant plaintiff was lawfully on the aforesaid premises he was caused to fall.

8. The defendant, MARC ANTHONY"S INC., its servants, agents or employees, were negligent, careless and reckless in permitting conditions to exist which resulted in the occurrence herein.

9. The defendant, MARC ANTHONY'S INC., had actual and constructive notice of the aforesaid conditions.

10. The infant plaintiff, CLARENCE O. GOKAY, JR. was seriously injured in the accident referred to herein.

11. The infant plaintiff, CLARENCE O. GOKAY, JR. was injured in the accident referred to herein.

COMPLAINT

12. By reason of the foregoing, the infant plaintiff was severely and seriously injured, bruised and wounded, suffered and still suffers and will continue to suffer for some time to come, great physical and mental pain and great bodily injuries and became sick, sore and disabled and so remains, some of which injuries the infant plaintiff is informed and verily believes are permanent in their nature.

13. The infant plaintiff in no way contributed to said injuries and same were due to the carelessness and negligence of the defendant, Marc Anthony's Inc., its servants, agents or employees.

14. By reason of the foregoing, the infant plaintiff had been confined to hospital, bed and home for a considerable length of time.

15. By reason of the foregoing, the infant plaintiff has been damaged in the sum of $2,000,000.00.

SECOND CAUSE OF ACTION

16. At all times hereinafter mentioned,plaintiff, DOROTHY GOKAY, was and still is the mother of the infant plaintiff herein and as such is entitled to his services.

17. By reason of the foregoing, plaintiff, Dorothy Gokay, has been deprived of the services of the said infant plaintiff and his ability to render such services has been impaired.

COMPLAINT

18. By reason of the foregoing, plaintiff, Dorothy Gokay, has necessarily paid and has become liable to pay for medical aid and attendance and for medicines, and will necessarily hereafter incur further expenses of a similar character.

19. By reason of the foregoing, plaintiff, Dorothy Gokay, has been damaged in the sum of $500,000.00.

WHEREFORE, plaintiffs demand judgment against the defendants on the first cause of action in the sum of $2,000,000.00 and on the second cause of action in the sum of $500,000.00, with interest from June 17, 1973 together with the costs and disbursements of this action.

HARRY H. LIPSIG
Attorney for Plaintiffs
Office & P. O. Address
100 Church Street
New York, New York 10007
(212) 732-9000

ANSWER.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

INDEX #74Civ.4577

- X

CLARENCE O. GOKAY, JR., an infant, by his mother DOROTHY GOKAY, individually,

Plaintiffs,

-against-

MARC ANTHONY'S, INC., d/b/a MARC ANTONIO'S RESTAURANT,

Defendants.

- X

ANSWER

Defendant Demands Trial by Jury

The defendants appearing herein by their attorney, JOHN P. CONNORS, as and for their Answer to the Complaint of the plaintiffs, set forth as follows:

ANSWERING THE FIRST CAUSE OF ACTION:

FIRST: As to the allegations contained in paragraphs "1", "3", "6", "10", "11" and "12" of the Complaint, the defendants deny knowledge and information sufficient to form a belief thereof.

SECOND: The defendants deny each and every allegation contained in paragraphs "7", "8", "9", "12", "13" and "15" of the Complaint.

ANSWERING THE SECOND CAUSE OF ACTION:

THIRD: As to the allegations contained in paragraphs

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"16" and "17" of the Complaint, the defendants deny knowledge and information sufficient to form a belief thereof.

FOURTH: Deny each and every allegation contained in paragraphs "18" and "19" of the Complaint.

AS AND FOR A FIRST COMPLETE AFFIRMATIVE DEFENSE, THE DEFENDANTS SET FORTH:

FIFTH: That upon information and belief, any injuries sustained by plaintiff, CLARENCE GOKAY JR., an infant by his mother, DOROTHY GOKAY, was caused in whole or in part by reason of the negligence of said plaintiff and were not caused or contributed to by reason of any negligence whatsoever on the part of the defendants.

AS AND FOR A SECOND COMPLETE AFFIRMATIVE DEFENSE, THE DEFENDANTS SET FORTH:

SIXTH: That upon information and belief, any judgment rendered by this Court shall have no extra-territorial effect and shall be limited solely to res attached herein by plaintiff.

AS AND FOR A THIRD COMPLETE AFFIRMATIVE DEFENSE, THE DEFENDANTS SET FORTH:

SEVENTH: That upon information and belief, the place of trial of the within entitled action should be changed from the United States District Court for the Southern District of New York

ANSWER

to the United States District Court for the Eastern District of Pennsylvania, since the Court is the improper tribunal for venue.

AS AND FOR A FOURTH COMPLETE AFFIRMATIVE DEFENSE, THE DEFENDANTS SET FORTH:

EIGHTH: That upon information and belief, pursuant to F. C. A. Rules, Civil Procedure, Rule 17 and Section 32, New York Domestic Relations Law, the plaintiff, CLARENCE O. GOKAY, JR., an infant by his mother, DOROTHY GOKAY, individually, does not have the proper capacity to sue.

AS AND FOR A FIFTH COMPLETE AFFIRMATIVE DEFENSE, THE DEFENDANTS SET FORTH:

NINTH: That upon information and belief, pursuant to F. C. A. Rules, Civil Procedure Rule 21, there is a non-joinder of proper parties plaintiff herein.

AS AND FOR A SIXTH COMPLETE AFFIRMATIVE DEFENSE, THE DEFENDANTS SET FORTH:

TENTH: That upon information and belief, the infant plaintiff, CLARENCE O. GOKAY, JR., was unlawfully and without proper permission on the premises of the defendants at the time alleged in the Complaint.

WHEREFORE, the defendants demand judgment dismissing the

ANSWER

Complaint of the plaintiffs, together with costs and disbursements of this action.

Dated: New York, New York
July 1, 1975

JOHN P. CONNORS, Esq.

BY: William A. Dubrowski
William A. Dubrowski
Attorney for Defendants
Office & P. O. Address
27 William Street
New York, New York 10005
Phone: (212) 422-9038

TO: HARRY H. LIPSIG, Esq.
Attorney for Plaintiffs
Office & P. O. Address
100 Church Street
New York, New York 10007
Phone: (212) 732-9000

EXTRACT FROM CLERK'S MINUTES.

At a Slated Term of the United States District Court for the Southern District of New York, held in the United States Court House in the Borough of Manhattan, City of New York on the 18 day of May in the year of our Lord, One Thousand Nine Hundred and Seventy-Six.

PRESENT: HONORABLE JUDGE CONNER,
United States District Judge.

- -X

CLARENCE O. GOKAY, JR., an infant by his mother, DOROTHY GOKAY, individually

vs.

MARC ANTHONY'S INC. d/b/a Marc Antonio's Restaurant

Docket No. 74 CIV 4577 W.C.C.

- -X

Now comes the Plaintiff by Harry H. Lipsig, 100 Church Street, New York, New York, and moves the trial of this cause. Likewise comes the Defendant by William A. Dubrowski, 27 William Street, New York, New York.

EXTRACT FROM CLERK'S MINUTES

Thereupon a Jury is duly empaneled and sworn, and the cause proceeds to Trial.

May 18, 1976 Jury Trial Begun.

May 19, 1976 Trial Cont'd.

May 20, 1976 Trial Cont'd.

May 24, 1976 Trial Cont'd & Concluded.

See Attached - Questions to be Answered By The Jury.

Jury Verdict for plaintiff in the sum of $150,000.00.

JOE VISCARDI

EXTRACT FROM CLERK'S MINUTES

QUESTIONS TO BE ANSWERED BY THE JURY

1. Was Clarence Gokay, Jr. an employee of Marcantonio's Restaurant on June 17, 1973?

NO
(Yes or No)

(If the answer to question 1 is "Yes" no further questions need be answered.)

2. Was Clarence Gokay, Jr. injured as a proximate result of working in or about Marcantonio's Restaurant with the knowledge and acquiescence of Mr. DiMarcantonio at the time of the accident on June 17, 1973?

YES
(Yes or No)

(If the answer to question 2 is "No," no further question need be answered.)

3. What amount of money will fairly and reasonably compensate Clarence Gokay, Jr. for the injury he sustained on June 17, 1973?

$ 150,000-

PEARL KOSLER
Jury Foreman

JUDGMENT.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

- -X

CLARENCE O. GOKAY, JR., an infant by his mother, DOROTHY GOKAY, individually,

Plaintiffs,

-against-

MARC ANTHONY'S INC. d/b/a Marc Antonio's Restaurant,

Defendant.

74 Civ. 4577

WCC

#76,548.

- -X

This action having come on for trial before this Court and a jury before the Hon. William C. Conner, District Judge Presiding, and the issues having been duly tried and the jury having duly rendered its verdict, it is

ORDERED and ADJUDGED that the plaintiffs, Clarence O. Gokay Jr. an infant by his mother Dorothy Gokay individually, recover of the defendant Marc Anthony's Inc.

JUDGMENT

d/b/a Marc Antonio's Restaurant, the sum of One hundred fifty thousand ($150,000.00) dollars and costs to be taxed by the Clerk.

DATED: New York, N. Y.
June 3, 1976

WILLIAM C. CONNER
U.S.D.J.

JUDGMENT ENTERED - 6/11/76

Raymond F. Burghardt
Clerk

6/22/76 - No appearance in opposition, Bill of Costs as taxed in the sum of $2,568.56, in favor of plaintiff, as against defendants, and added to the judgment.

Raymond F. Burghardt
Clerk

NOTICE OF APPEAL.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT : NEW YORK

----------x

CLARENCE O. GOKAY, JR., an infant, by his mother, DOROTHY GOKAY, Individually,

Plaintiff,

- against -

74 CIV. 4577 (WCC)

MARC ANTHONY'S INC., d/b/a MARC ANTONIO'S RESTAURANT,

NOTICE OF APPEAL

Defendant.

----------x

Notice is hereby given that the defendant above named hereby appeals to the United States Court of Appeals for the Second Circuit from the Judgment entered in this action on the 11 day of June, 1976 and from the whole thereof.

Dated: New York, N. Y.
July 2, 1976

BOWER & GARDNER
Attorneys for Defendant
Office & P. O. Address
415 Madison Avenue
New York, N. Y. 10017
By a Member of the Firm

TO: HARRY H. LIPSIG
Attorney for Plaintiff
100 Church Street
New York, N. Y. 10007

EXCERPTS FROM TRANSCRIPT.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

CLARENCE O. GOKAY, JR., an infant, by his mother, DOROTHY GOKAY, etc., Plaintiff, -against- MARC ANTHONY'S, INC., d/b/a MARC ANTONIO'S RESTAURANT, Defendant.	Before: HON. WILLIAM C. CONNER, D.J., and a Jury. 74 Civil 4577

New York, May 13, 19, 20, 1976

STENOGRAPHER'S MINUTES

lhlm

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

CLARENCE O. GOKAY, JR., an infant, by his mother, DOROTHY GOKAY, etc.,

Plaintiff,

-against-

74 Civil 4577

MARC ANTHONY'S, INC., d/b/a MARC ANTONIO'S RESTAURANT,

Defendant.

----------x

Before:

HON. WILLIAM C. CONNER,

District Judge,
and a Jury.

New York, New York
May 18, 1976 - 2:20 p.m.

APPEARANCES:

HARRY H. LIPSIG, ESQ.,
Attorney for Plaintiff
By: JOSEPH NAPOLI, ESQ.,
of counsel.

BOWER & GARDNER, ESQS.,
Attorneys for Defendant
BY: CLIFF A. BARTLETT, ESQ.,
BARBARA BILLAUER, ESQ.,
of counsel.

going to permit the reading of the question and the first sentence of the answer.

(In open court.)

MR. BARTLETT: As I was indicating, your Honor, page 78, line 14.

(Mr. Bartlett read from the deposition of Anthony DiMarcantonio to the jury.)

Thank you, your Honor.

THE COURT: Mr. Napoli, call your next witness.

MR. NAPOLI: At this time, your Honor, I call Thomas Gokay as the next witness, your Honor.

T H O M A S F R A N C I S G O K A Y, called as a witness by the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. NAPOLI:

Q Thomas, just try and reach me so I can hear you and the jurors can hear you and Mr. Bartlett can hear you.

Can you please tell us, Tom, when you were born, your date of birth?

A November 11, 1958.

Q In 1973 do you recall how old you were, in June of 1973?

A Fifteen.

Q In June of 1973, can you tell the Court and the jury, did you have brothers and sisters at that time?

A Yes, I did.

Q Can you please tell us as best you can approximately what their age was in terms of what brothers and sisters you had at that time? Let's just have their names, first.

A Mike, Scott, Sherry, Bryan, Chucky, Dorothy and Patricia.

Q How old was Bryan in June of '73?

A Seventeen, I think.

Q How old was Chucky?

A Twelve.

Q Did there come a time, as far as you recall, when your father began working at the defendant restaurant?

A Yes.

Q Do you recall what month that was?

A No, I don't.

Q Do you recall how many months prior to June, 1973 he had been working at the restaurant?

A About three or four.

Q About three or four months?

A Yes.

Q Prior to Father's Day, June 17, 1973, had you

gone over to that restaurant?

A Yes.

Q How many times, approximately, had you gone over to the restaurant?

A Ten or fifteen.

Q When you went over to the restaurant did you go over alone or did you go over with your father or with someone else?

A When they needed me, my mother would bring me up, mainly.

Q For what reason did you go over to the restaurant?

A To help my father out.

Q Help your father where?

A In the kitchen.

Q How many times did you do this prior to June 17, 1973?

A About ten or fifteen.

Q Prior to June 17, 1973 had you met Anthony DiMarcantonio?

A Yes.

Q Was he introduced to you as the owner of the restaurant?

A Yes.

Q When you went over to help your father these ten

or fifteen times at the restaurant, was anyone else there -- withdrawn.

You said you helped your father in the kitchen, is that correct?

A Right.

Q In any of these ten or fifteen times prior to June 1., 1973, besides you and your father helping in the kitchen--you helping your father in the kitchen, did any one else, to your knowledge, help your father in the kitchen?

A Yes.

Q Will you tell us who?

A My brother Chucky.

Q Anyone else?

A And Bryan, before that.

Q You say "Bryan, before that." Do you recall when, prior to June 17, approximately, 1973, Bryan would help your father with you in the kitchen of the restaurant?

A I don't recall.

Q Did there come a time when Bryan stopped working in the kitchen?

A Yes.

Q Can you tell us, approximately, when Chucky began helping in the kitchen?

A After Bryan left. We needed more help.

THE COURT: You mean after Bryan quit working?

THE WITNESS: Yes.

THE COURT: Then Chucky helped after that?

THE WITNESS: Yes, when we needed him.

Q When did you go over to the restaurant to work, in terms of weekends or at night or after school or during the school recess? When would you go over?

A Sometimes after school, and the weekends.

Q What would you do in the kitchen, in terms of helping out your father, in terms of his being a chef?

A Help prepare the food, and stuff, and wash the dishes, sometimes.

Q Did you, prior to June 17, 1973, ever operate this Hobart machine?

A Yes.

Q While you were working there in the kitchen, would Marcantonio come in the kitchen, speak to you, see you?

A Yes.

Q This was over this three-month period prior to the accident?

A Right.

Q Did Marcantonio pay you for the work that you did while you helped your father in the kitchen?

A Yes.

Q How would he pay you?

A In cash.

Q Did you ever see Marcantonio pay your brother Bryan?

A Once or twice.

Q When Chucky worked in the kitchen, prior to June 17, 1973, what did he do in the kitchen?

A Wash the pots and wash the dishes.

Q Did he do anything else in terms of helping out in the kitchen?

A Cleaned out all the refrigerators, and stuff.

Q This was prior to June 17, 1973?

A Yes.

Q While Chucky was working in the kitchen, would Marcantonio come into the kitchen and see Chucky there?

A Yes.

Q On June 17, 1973, approximately what time, if you recall, did you get to the restaurant?

A 11 or 11:30; somewhere between there.

Q When you got there, who did you get there with?

A My father.

Q Anyone else with you?

A Chucky.

Q Did you go into the restaurant?

A No. It was locked. We had to bang on the door.

Q After you banged on the door, did you get into the restaurant?

A Yes.

Q Where did you go?

A Into the kitchen.

Q What did you start doing in the kitchen?

A Started preparing food.

Q Did there come a time when you were doing something in terms of preparing tomatoes, or anything like that?

A Yes.

Q Can you tell the Court and jury what you were doing in terms of preparing these tomatoes?

A Grinding them up so you can make the sauce.

Q Where were you grinding them up?

A In the machine.

Q Was that the Hobart machine we have been referring to?

A Yes.

Q You had done that before?

A Yes.

Q While you were using that machine, was Chucky at any time in the kitchen with you and your father?

A Once or twice before that.

Q I am talking about on June 17, 1973, while you were working the machine; was he in the kitchen?

A Yes.

Q Do you recall where he was at any time while you were working the machine?

A He was behind, by the refrigerator, cleaning out the refrigerator.

Q Did there come a time when an accident occurred,--

A Yes.

Q -- involving the Hobart machine?

A Yes.

Q Can you please tell the Court and the jury what you remember in terms of what you were doing and what anyone else was doing in terms of this particular accident?

A When I turned around and put the empty cans down and get some more, when I turned around I seen my brother off balance, pulling his hand out of the machine.

Q In other words, you turned around to get some more tomatoes?

A Yes.

Q As you turned back, you say you saw Chucky off balance, pulling his hand out of the machine?

A Yes.

Q After that, what did you do?

A As he got it out, I turned off the machine.

Q Did you do anything with respect to Chuck?

A I brought him over to my father.

Q After that, did someone else come into the kitchen?

A Yes; Marcantonio.

Q When this accident occurred, who was in the kitchen?

A The guy that was washing the bar, making the drinks, the bartender.

Q Anyone else?

A No, I don't remember.

Q Was your father in the kitchen?

A Yes.

Q Were you in the kitchen?

A Yes.

Q And your brother Chucky?

A Yes.

MR. NAPOLI: No further questions.

CROSS-EXAMINATION

BY MR. BARTLETT:

Q Are you called "Tom" or "Tommy"?

A Tom.

Q Tom, let me ask you a few questions, if I can.

I think you told us that you had a brother named "Bryan," is that right?

A Right.

Q And Bryan today is how old?

A Nineteen.

Q Incidentally, Tom, at any time when I ask you a question, if you don't understand it, let me know and I will be glad to ask you again. It is my job to make sure that you understand the questions, not the other way around. All right?

A Yes.

Q If you don't know, tell me.

Today, you say, Bryan is 19?

A Yes.

Q There came a time in 1973, as I understand it, that your father was employed at the Marcantonio restaurant as a chef, is that right?

A Right.

Q To your knowledge, had your father been a chef before that any place else?

A Yes.

Q Had he been a chef for a number of years?

A Yes.

Q Would it be fair for me to say that as far as you know, your father was an experienced chef?

A Yes.

Q You say that Bryan was working there sometime during 1973. Was Bryan in school at the time?

A Yes, he was.

Q What school was he in?

A Port Jervis High.

Q On what occasions did he work there? In other words, was it five days a week? Weekends? You tell us.

A Every time we were open; about six days a week.

Q What hours would Bryan work?

A After school, until we close.

Q Approximately when is that?

A Say, about seven or eight hours.

Q Your brother Bryan, I take it, worked there the various hours he did work there, when your father was present on the premises, is that correct?

A Yes.

Q Is it fair to say that when your brother was there -- what was he? A senior in high school at the time?

A No.

Q He was 17, in either event?

A Yes.

THE COURT: Sixteen, he would have to be. If he is 19 now --

Q How old is he now, Tom?

THE COURT: He said "19."

THE WITNESS: I think he is 20. I am not sure. Yes, he is 20. He just had his birthday.

Q So he is 20 now, and then he was approximately 17, I take it?

A Yes.

Q Fair enough?

A Yes.

Q From what you told us here this morning, I take it that your brother -- now I am talking about Bryan, of course--your brother Bryan did various chores at the restaurant under the direction of your father who was the chef, is that correct?

A Yes.

Q Did there come a time when your brother Bryan stopped working?

A Yes.

Q What occasioned, if you know, your brother Bryan to stop working?

A Would you repeat the question?

Q When did he stop working?

A I don't remember the day.

Q Could you tell us the season of the year?

A It was during the end of school.

Q As far as high school is concerned in Port Jervis in 1973, did they stop working as students in school at the end of June?

A No.

Q When did they stop working?

A Would you repeat that question?

Q When did high school close?

A At the end of June.

Q So I take it that what you are saying was that after the high school closed down for the summer, your brother stopped working at the restaurant. Now I am referring to your brother Bryan, of course. Is that right?

A Yes.

Q Your brother Bryan stopped working at the restaurant, so you tell us. What did he do then?

A He joined the Service.

Q That's a good point of reference. When did he join the Service? Could you remember that?

THE COURT: How long after school was out?

THE WITNESS: He joined before.

THE COURT: Before school was out?

THE WITNESS: Yes.

THE COURT: But he didn't report for duty until school was out?

THE WITNESS: No.

Q When did he report for duty?

A I don't recall.

Q Do you know if he was around, home, for any period of time after school ended, before he reported for duty in the Service?

A Yes.

Q Approximately how long was he around home before he reported for duty?

A About a week.

THE COURT: Was he working at the restaurant during that week or not?

THE WITNESS: No.

Q What type of work did your brother Bryan do at the restaurant?

A He would cook meals and stuff for my father.

Q You say "He cooked meals and stuff for your father"?

A With my father.

Q In other words, he did whatever your father told him to do concerning the preparation of meals; is that a

fair statement?

A Right.

Q Between your brother Bryan, who was I think you said 17 years of age at the time; and your brother Chuck, who I think was 12 at the time -- is that right?

A Yes.

Q There would be you, is that right? -- in age.

A Yes.

Q Anybody else in the family?

A No.

Q How much older are you than Chuck?

A Two years.

Q When your brother left the restaurant, is it your testimony that your father picked the 12-year-old to take the place of Bryan who was going in the Service?

A No.

Q So if you said that to Mr. Napoli this morning, would you be mistaken?

A No, sir.

Q Perhaps you can help me, Tom. Did your father pick the 12-year-old Chuck to replace your older brother Bryan who was going in the Service?

A When Marc asked him to bring him up.

Q Did he come along to replace -- in other words,

the 12-year-old was brought in to replace the fellow going in the Service?

A No.

THE COURT: He didn't say that. He said that Chucky worked after Bryan left, but he didn't say that he replaced Bryan.

Q Did you say this morning that Chucky did the work that Bryan did?

A No. I did.

Q You did?

A Yes.

Q What did Chuck do?

A Washed dishes and washed pots.

Q How many times did Chuck do this?

A About five or six.

Q All together?

A Yes.

Q Were you familiar with the set up in the kitchen that your father ran?

A Yes.

Q Did they have someone who cleaned pots and dishes?

A Yes.

Q Who was that?

A My brother Chucky.

Q I thought you just said that your brother Chucky only did that approximately five times.

A Well, I wasn't there for that long of a time.

Q You were there from at least April, weren't you?

A No. It had to be after that.

Q May?

A I think I started in June.

Q You started in June?

A Yes.

Q Who was there before you? Do you know?

A I don't recall.

Q Did your brother Chuck start in June?

A Yes.

Q Was your brother Chuck ever there in April?

A A couple of times.

Q So I take it the 12-year-old was there before you were there?

A Yes.

Q Is it fair to say, then, you can't tell us from your own personal knowledge what Chuck did there those several times in April?

A He cut the grass.

Q Did you just tell us you weren't there?

A No, but that was what he was going to do.

Q So he went to cut the grass, is that right?

A Yes.

Q Let me ask you this: As far as the premises are concerned, is it fair to say that this is one private home that was changed or restored in some manner into a restaurant on the first floor and then there were living quarters on the second floor of this old, private home?

A Yes, sir.

Q I take it, then, that whatever the grass or lawn that was there, it belonged to both the restaurant and the private home, is that right?

A Right.

Q So on the two occasions in April you tell us your brother was there, he was outside cutting the grass, is that right?

A Right.

Q Of course, you say you got there in June, is that right?

A Yes.

Q So you have no idea what your brother was doing, if he was doing anything, up until at least you were there, is that right?

A Right.

Q You told us, I believe, that you had been in the restaurant before June 17th but--in other words, earlier in the month of June, is that right?

A Yes.

Q Would it be fair for me to say that you were in the kitchen area?

A Yes.

Q Were you familiar with what the kitchen area looked like?

A Yes, sir, I was.

Q Had you seen this Hobart machine before?

A Yes.

Q Were you familiar with what it looked like?

A Yes.

Q If you saw it again, would you recognize it?

A Yes, I would.

Q I ask you just to look at these three photographs. Take your time. Tell me when you are finished.

(Pause.)

Q Have you looked at them?

A Yes.

Q Are they fair and accurate photographs of how the kitchen looked on or about June 17, 1973?

A Yes.

Q Let me show you these three photographs. Take your time; look at them. Let me know when you are finished.

(Pause.)

Q Are they fair and accurate photographs of what the Hobart machine looked like on June 17, 1973?

A Yes, pretty sure.

MR. BARTLETT: I will introduce them in evidence, your Honor.

(At the side bar.)

THE COURT: Obviously the tape measure has been added.

MR. NAPOLI: I don't think the photographs with the tape measure should be admitted. I don't know what's going on here --

THE COURT: You don't know what's going on with the tape measure?

MR. NAPOLI: I wasn't there when this tape measure was set up, your Honor. I don't think it is fair.

THE COURT: I assume there will be testimony that that's a tape measure that is accurately marked in inches and feet.

MR. NAPOLI: At that time, I would have no objection. I have no objection to this photograph which shows it and

these photographs that show the whole room. I have an objection to this tape measure because I wasn't there when this thing was set up.

MR. BARTLETT: Judge, if that's his objection, I will take those three and we will wait on these.

MR. NAPOLI: That is four.

THE COURT: All right.

(In open court.)

(Defendant's Exhibits B through E, inclusive, for identification received in evidence.)

(Defendant's Exhibits F and G marked for identification.)

Q On June 17, 1973, you were working with the Hobart machine, is that correct?

A Yes.

Q You were putting tomatoes into the pan that was over the grinding attachment?

A Yes, sir.

Q Do I take it that you would put the tomatoes into the pan and they would be stuffed down into the grinding attachment?

A Yes, sir.

Q Under the grinding attachment there was some sort of a bowl that would catch whatever material came

through the grinding attachment, is that right?

A Yes.

Q So there is no doubt about it, when you were working with the machine, there was connected to that Hobart machine the meat-grinding attachment and the pan on top of the meat-grinding attachment, is that right?

A Yes.

Q The pan itself that you were using, it was a circular pan, was it not?

A Yes.

Q In terms of the circular pan, did it have a depth to it?

A Yes.

Q What was the depth of the circular pan? Incidentally, if you would like to see any of those pictures in evidence again, I will be glad to let you look at them. If this would help you at all, take a look at this. Take a look at any of them, if it would help. What was the depth of the pan?

A About four inches.

Q The pan was four inches deep?

THE COURT: It isn't flat-bottomed, is it?

MR. BARTLETT: Let me ask one other question. Perhaps I can clarify that.

Q Tom, when you said it was four inches, what measurement of the pan were you referring to?

A I mean connected to the grinding part.

Q The part that connected to the grinder was four inches from top to where it connected to the grinder, is that what you are saying, or are you saying something else?

A Will you repeat the question again?

Q The pan connected onto the grinder, is that right?

A Yes.

Q From the top of the pan to where it connected onto the grinder was approximately how much in inches?

A About four inches.

Q That's the measurement you are talking about, right?

A Right.

Q The pan itself you told us was round. Do you know what the measurement diameter is?

A Yes.

Q What was the diameter in terms of inches?

A I don't recall.

Q It was attached onto the grinding part. Within the grinding part, were there blades down below?

A No.

Q What was down below that would do the grinding?

A It was like a worm thing that would turn.

Q There was some sort of mechanism that would turn, and that was the thing that did the grinding, is that right?

A Then it goes through the blade, then the holes.

Q Let's talk about the blades, then. You say there were blades down there some place?

A Only one.

Q One?

A Yes.

Q From the top -- not of the pan, Tom, but from the top of the grinding attachment down to where the blades were, what was the distance?

THE COURT: You are leaving out the pan now?

MR. BARTLETT: Yes, that's what I am doing, Judge.

Q You understand, Tom? I am not talking about the pan. I am just talking about the grinding attachment. From the grinding attachment down to where the blades were, what was the distance?

THE COURT: If there is something between the top and the blades, such as the worm that he referred to, then I think that is the dimension that's important.

Obviously, the worm can cause damage to fingers.

Q I ask you to look at that photograph. Tell me when you have looked at it.

MR. NAPOLI: Your Honor, does counsel have an extra set of photographs?

MR. BARTLETT: No, I don't.

MR. NAPOLI: For the Court and ourselves?

THE COURT: You may come around and look at the photographs at the same time the witness is, if you want to.

MR. NAPOLI: No. I just want to see which photograph he is referring to. This photograph isn't in evidence.

MR. BARTLETT: That's what I am doing. I am asking him to identify it. Then I will move it in, Mr. Napoli.

Q Did you see that photograph I showed you?

A Yes.

Q Is that a fair and accurate representation of the Hobart machine shown with the grinding attachment on but without the pan on the top of the grinding attachment?

A Yes, it looks like it.

MR. BARTLETT: Your Honor, I will ask that that be moved into evidence.

THE COURT: Any objection?

MR. NAPOLI: No objection.

(Defendant's Exhibit H for identification received in evidence.)

Q Tom, let me show you Defendant's H in evidence and Defendant's B in evidence. Concerning the grinding machine or the grinding -- what is it, the grinding appliance, the addition to the machine? Was there anything else on the machine for the grinding, other than what you see in H? In other words, the grinding apparatus, plus what you see in B, which would be that pan that fits on top of the grinding apparatus?

A No, sir.

Q In other words, there is nothing that goes in the middle, right? The pan fits into the grinding apparatus just as it is shown there, right, Tom?

A Yes.

Q Let's just talk about Photograph H, which is the picture of the grinding apparatus without the pan on it. Okay?

A Yes.

Q How far down from the top of the grinding apparatus would you go in inches or any measurement you care to tell us, before you would come to any object, be it a wheel or

a blade? In other words, the nearest object.

A About four inches.

Q So I take it, you have to go at least four inches down into the grinding apparatus before you come to the nearest object, is that right?

A Yes.

Q On top of the grinding apparatus, was there placed the pan as shown in Exhibit B?

A Yes.

Q The pan itself, did the pan have what is called a "lip" on the pan?

A On the bottom or on the top?

Q Do you understand what that means?

THE COURT: Rephrase it. I don't know what you mean.

Q The pan itself you told us was round?

A Yes.

Q Were there sides to the pan?

A Yes.

THE COURT: I thought that's what you were talking about when you were talking about the four inches.

MR. BARTLETT: Your Honor made a point and you said something that it might have gone down a little.

THE COURT: It goes down in the center.

MR. BARTLETT: That's what I wanted to clarify now.

Q The four inches you talked about, was that the difference between the side of the pan?--in other words, from the top of the side to the bottom of the side?

A I mean, to the bottom down in the pan.

THE COURT: He means, all the way to the very bottom where it attaches, was four inches.

THE WITNESS: Yes.

Q After where it attaches, there is another four inches down into whatever it is, right?

A Would you repeat the question?

Q Let me withdraw it, Tom.

From the top part of the pan to the lower part of the pan, you said, is four inches, right?

A No.

Q I am sorry, I thought you did.

THE COURT: I thought he did, too.

A I meant from this part down to the worm.

Q Do you know to where?

A This part right here; the bottom of the pan right here, down to here.

THE COURT: You did say that's four inches. I thought you also said that from the top of the pan to the

point where the pan attaches to the grinder is also four inches.

THE WITNESS: I meant from the top, the inside, where the hole begins.

MR. NAPOLI: When you say "the hole begins," you mean the hole within the pan?

THE WITNESS: Yes.

Q Besides that, how many inches is the side of the pan itself?

A Say, an inch-and-a-half.

Q Is that depicted there anyway?

A Excuse me?

Q Is that depicted there anywhere?

Would you please mark, with the Court's permission, if we have a red pencil, the dimension on that pan that you say is an inch-and-a-half?

MR. NAPOLI: I thought he said "about an inch-and-a-half," your Honor.

THE COURT: All right. He has drawn a vertical, red line on the side of the pan.

Q The meat grinder has a neck, of course, correct, that fits up?

A Yes.

Q Again, if I can ask you in terms of diameter, you

said you understood what that measurement was; what was the diameter of the neck?

A I don't recall.

Q Would it refresh your recollection, Tom, if you looked at Defendant's H in evidence?

A No, I don't think so.

Q If it doesn't help you, just tell us.

A No.

Q In order to get the tomatoes into the pan and into the grinder, I take it you place them in the pan first, is that right?

A Yes.

Q And you have to get them down into the grinder from the pan, is that right?

A Right.

Q They have to be forced down into the grinder, is that fair to say, so they can be chopped up and then come into the bowl that's on the bottom, is that right?

A Not really forced.

Q Do they go down by themselves?

A Yes.

Q How big were the tomatoes?

MR. NAPOLI: I didn't get that last answer. "Did they go down by themselves?"

MR. BARTLETT: I think he said "Yes."

THE WITNESS: Sometimes.

THE COURT: You mean they go down to the worm by themselves?

THE WITNESS: Yes.

THE COURT: Or do they have to be pushed down to get there?

THE WITNESS: They slide out like juice, when you put them in the pan. Then you have to plunge them down.

THE COURT: You have to plunge them down to get to the pan?

THE WITNESS: Yes.

Q In other words, they do have to be forced down to get to what you call the "worm"?

A Yes.

Q During the spring of 1973, was your mother employed?

A Yes.

Q Was she -- where was she employed?

A Deer Park Farms.

Q What was she doing there, Tom? Can you tell us?

A She was a chamber maid, I think.

Q So I take it, then, both your mother and your

father were working, is that right?

A Yes.

Q Living at home, other than your mother and father, were there any other relatives besides children?

A No.

Q Besides a son or a daughter?

A No.

Q Did your mother have a full-time job?

A Yes.

MR. BARTLETT: Nothing further.

THE COURT: Any redirect?

REDIRECT EXAMINATION

BY MR. NAPOLI:

Q You made reference to these tomatoes going down by themselves. Was there any kind of suction there?

A Yes.

Q There was a suction?

A Yes.

Q You mentioned before, in answer to my questions, that you had worked there about ten or fifteen times. Then when Mr. Bartlett was asking you about dates, you mentioned that this accident was June 17th, and you mentioned that you had started working sometime the beginning of June. Could you have started working prior

to June?

A Yes.

Q Could you have worked during the month of May?

MR. BARTLETT: Objection, your Honor.

THE COURT: The question is not whether he could have.

Q Did you work during the month of May?

A I don't recall.

Q Did you work during Easter week in April?

MR. BARTLETT: Objection, your Honor. We have been through this --

THE COURT: He can answer.

A I don't recall.

MR. NAPOLI: No further questions.

THE COURT: Let me ask you this: You say that the tomatoes were plunged down to the worm. Was any kind of a pushing device used to push them down?

THE WITNESS: Yes.

THE COURT: What kind of a device?

THE WITNESS: It was like a mallet.

THE COURT: A wooden mallet?

THE WITNESS: Yes.

THE COURT: That would fit down into the neck?

THE WITNESS: Yes.

THE COURT: And push things down?

THE WITNESS: Yes.

THE COURT: That was the way you normally operated the machine?

THE WITNESS: Yes, sir.

MR. BARTLETT: Just two further questions, your Honor, and I will be through.

RECROSS-EXAMINATION

BY MR. BARTLETT:

Q Let me show you this picture, Tom. Is that a fair and accurate representation of how the meat-grinding neck attachment on the machine would look, looking down the neck?

A Yes.

MR. BARTLETT: I ask that be moved into evidence, your Honor.

THE COURT: It does have the ruler on it.

MR. NAPOLI: I object.

THE COURT: I will permit it, with the instruction to the jury that the ruler has been added, and it hasn't yet been established why it was put there or even that this is an accurate ruler; so for present purposes, ignore the ruler, unless and until someone explains that that is an accurate ruler.

MR. BARTLETT: No further questions.

(Witness excused.)

(Defendant's Exhibit I for identification received in evidence.)

MR. NAPOLI: May I look at the photograph? No objection except for the one objection I made.

THE COURT: I have a committee meeting that I am supposed to attend before lunch. We will take a little longer than our normal lunch break and come back at two o'clock.

(Luncheon recess.)

AFTERNOON SESSION

2:10 p.m.

(In open court; jury present.)

MR. NAPOLI: Your Honor, I would request that all witnesses who are not parties to the action be excluded from the courtroom. I see a gentleman in the courtroom. I don't know who he is.

MR. BARTLETT: That is Mr. DiMarcantonio, your Honor.

MR. NAPOLI: Then I have no objection to his being here, your Honor.

I call as my next witness, Clarence Gokay, Sr., your Honor.

C L A R E N C E O R B I S G O K A Y, S R., called as a witness by the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. NAPOLI:

Q Mr. Gokay, can you tell us back in March, 1973, where you were employed?

A I was employed by Marc Antonio's Ristorante in Milford, Pennsylvania.

Q When did you start working for --

A March 11, 1973.

Q Were you working there during the months of March,

April, May and June of 1973?

A I was.

Q Can you tell me what your position was in Marc Antonio's Ristorante?

A I was the chef.

Q Can you tell us what kind of a restaurant Marc Antonio's was; how big it was; how many tables; that kind of thing?

A Well, we had approximate seating capacity of probably 110 people. We had a waiting room which they used for a cocktail room; and we had three dining rooms: one large dining room and two smaller ones.

Q In terms of the kitchen, you already told us that you were the chef in that period of time, is that correct?

A That's right.

Q Did you hear me read the testimony of Mr. Marcantonio in terms of there being -- in terms of help in the kitchen, an assistant chef? Did you hear me read that?

A Would you repeat that question, please?

Q Did you hear, in terms of help in the kitchen, the question[illegible] answers I read of Marcantonio --

A Yes.

Q -- in terms of assistant chef?

A Yes.

Q He also mentioned, in terms of the kitchen, that there would be someone else who would assist in the kitchen, who would wash pots and dishes and things of that kind?

A That's correct.

Q Do you recall the testimony with respect to -- I read -- in terms of his not remembering who on June 17, 1973 was the assistant chef and who was the pot washer and dishwasher? Do you recall that testimony?

A Would you rephrase that question a little bit? May I ask the Judge a question, please?

Q No, you can't ask the Judge a question. I will withdraw the question and rephrase it.

Sometime this morning, I read part of Mr. Marcantonio's --

A I remember it very well.

Q I asked him who --

A At that time we were lucky if we ever had any help.

Q Let me finish asking the question. Just answer my question. I asked him what positions there were in the kitchen besides your position as a chef. Isn't that correct? Yes or no.

A Correct, yes.

Q Then he said there was an assistant chef and there was a dishwasher and pot washer, is that correct?

A Correct.

MR. BARTLETT: Might I object to this line of inquiry? Apparently he is asking this witness to comment on testimony of another witness.

THE COURT: It is merely introductory, I am sure.

MR. NAPOLI: I am laying a foundation, your Honor.

THE COURT: Get to the point.

Q You recall the question being asked, "Well, who was the assistant chef and who was the dishwasher and pot washer?" Do you recall those questions being asked?

A Yes.

Q And Mr. Marcantonio says he doesn't remember. He was going to supply us with the names at that time, sometime last year; isn't that correct?

A Correct.

Q And Mr. Bartlett said that the names weren't supplied; they didn't have any; isn't that correct?

A Correct.

MR. BARTLETT: Your Honor, I will object to this in that, among other things, it is an improper characterization. The question asked was: "If there was one at that time,

we will supply you with the name." I think Mr. Napoli has read that, your Honor.

THE COURT: Sustained.

Q Can you tell us on June 17, 1973 who was working as the assistant chef?

A My son Tommy was helping me in the kitchen.

Q Who was working as the dishwasher and pot washer on June 17, 1973?

A My son Chucky.

Q Prior to June 17, 1973 had any of your children been employed by Marcantonio?

A Yes.

MR. BARTLETT: I object to the form, your Honor.

A (Continuing) Yes.

MR. BARTLETT: As I indicated to the other witness, will you kindly instruct this gentleman that when an objection is raised, he shouldn't answer until the Court has an opportunity to rule?

THE COURT: Yes, wait until I rule. I am going to sustain the objection as to form.

Q Prior to June 17, 1973, was anyone else besides yourself employed by Marc Antonio's Ristorante?

THE COURT: Anybody else? That would include --

MR. NAPOLI: Besides himself. I will withdraw the

question.

Q Prior to June 17, 1973 was anyone else, besides yourself in your family, employed in Marc Antonio's Ristorante?

MR. BARTLETT: Objection, your Honor.

THE COURT: Overruled.

MR. BARTLETT: Your Honor, may we have a very brief side-bar conference on this one issue?

THE COURT: No.

MR. BARTLETT: Excuse me, your Honor, not to be obstructive, at the appropriate time your Honor feels --

THE COURT: I know the point you are going to raise, I am sure.

MR. BARTLETT: At an appropriate time, may I make a record on that? Whenever your Honor feels it is appropriate.

Q You can answer that question, Mr. Gokay.

A Yes.

Q Can you please tell the Court and the jury what other members of your family besides yourself were employed by Marc Antonio's Ristorante even prior to June 17, 1973?

A Well, there was Tommy, Bryan and Chucky and Scott, at one time.

Q Can you tell me in point of time when Bryan, if

you recall, worked at the restaurant?

A I don't recall the certain dates, no.

Q In terms of months?

A Well, I would go back to April, May, at certain times. But I don't want to be quoted as saying "at a certain date," because I don't remember a certain date.

Q Approximately?

A Approximately, yes.

Q What duties did he perform at the restaurant, Marc Antonio's?

A Which one are you referring to?

Q I am sorry. I am talking about Bryan.

A Bryan worked as an assistant cook.

Q Do you recall when Tommy worked in the restaurant in terms of months, approximately?

A When he first worked he used to wash pots, run the dishwasher, things like that, help prepare vegetables, clean out iceboxes, and sweep the floors, mop up, whatever we had to do, run and get stuff from the store room for me, and things of that nature.

Q What period of time did he do that kind of work?

A Between April and June.

Q You said on June 17, 1973 he worked as the assistant chef?

A Yes. That was after Bryan was there.

Q When did he start working as the assistant chef?

A After Bryan left to go in the Navy.

Q Did you ever see Marcantonio pay Bryan for working there?

A Yes, I have.

Q Did you ever see him pay Tommy for working there?

A I have.

Q How was Tommy paid when you saw him being paid?

A Tommy was usually paid in cash.

Q How was Bryan paid?

A I don't recall exactly. Sometimes he might have been paid in check and sometimes he was paid in cash. I don't remember exactly which way at certain times.

Q With respect to Chucky, what kind of work, prior to June 17, 1973, was Chucky doing?

A He would mow the lawns, and stuff like that. Then he would come in the kitchen. He worked around the kitchen, get stuff for me, go to the store rooms, if he need -- worked, cleaned out iceboxes, stuff like that. Whatever was around there to do, he would be helping out.

Q How many times, to your knowledge, had Chucky been doing this kind of work in and around the restaurant prior to June 17, 1973?

A I'd say numerous times.

Q When Chucky would do this kind of work, would Mr. Marcantonio be around, coming into the kitchen, seeing him do this kind of work, if you recall?

A Yes.

Q To your knowledge, was Chucky paid for doing this kind of work in and around the kitchen?

A He was given a gratuity for it, yes.

Q Was he paid in check or in cash?

A Cash.

Q Who paid him in cash, if you recall?

A Mr. Marcantonio.

Q Was this done those several times that you say he worked there in the kitchen?

A On numerous occasions, yes.

Q Did you have any conversations, prior to June 17, 1973 about Chucky working there, with Marcantonio, as pot washer, dishwasher, that kind of thing?

A We had conversations, yes.

Q Did he object at any time to Chucky performing this work?

A He didn't say anything to me, as long as he didn't operate the machines, or anything like that.

Q And he would pay him after he did this work?

A That's right.

Q You say that Scott would also work there. How old is Scott?

A Scott is 23 years old now, so he was about 20 years old at the time. He helped out a few times there.

Q Do you recall what time you got to the restaurant on June 17, 1973?

A I do.

Q What time was that?

A I would say it was approximately between a quarter of eleven, eleven o'clock; somewhere in that vicinity.

Q Do you recall how you got into the restaurant?

A I had to kick on the door so I could get Mr. Marcantonio up so I could get in the place, which I had done that many times before.

Q Mr. Marcantonio lived in the building, is that correct?

A He lived upstairs, yes.

Q You went over there with Tommy and Chucky. You kicked on the door, or whatever, to get him to open the door?

A Yes.

Q When he opened the door, he saw you, Chucky and Tommy; is that correct?

A He had to, because all three of us were together.

Q When you got there to the restaurant, did you go into the kitchen?

A I went into the kitchen and Tommy went in. I think Chucky stayed outside and he was talking to Marc, and I believe he was talking to him about mowing the law, or something like that.

Q Did Chucky mow the lawn, if you know?

A Yes, I believe he did that day, yes.

Q Did there come a time when you and Tommy were working in the kitchen?

A Right.

Q Did there come a time when Chucky came into the kitchen --

A Yes, there was.

Q -- to do some work?

A Right.

Q Do you recall about approximately what time he came into the kitchen to do some work, "he" being Chucky?

A After he was mowing the lawn; I believe it was somewhere in the vicinity of one o'clock, somewhere within that period of time.

Q When he came into the kitchen at one o'clock, what did Chucky do in the kitchen?

A Well, he come over to me and he says, "What could I do now, Dad?" I said, You could go into the ice-box, straighten the thing up, wipe up the floor," because we had condensation in there, the floors were damp, so I had him wipe up the floors.

Q Mr. Marcantonio's deposition said that on Sunday the restaurant would open at one o'clock, is that correct?

A We usually opened at one o'clock on Sunday, until nine, yes.

Q I assume customers started coming in after one o'clock.

A They did.

Q During the time that Chucky was in the kitchen cleaning out this refrigerator, did Marcantonio come into the kitchen at all?

A I seen him a couple of times, because I was cutting veal on the board, and I seen him come up by the register, like that, and walk around.

Q If he came into the kitchen, could he see Chucky where he was working?

A No. If he was working in the boxes, he couldn't see him, no, because he was inside the refrigerators.

Q Did there come a time when Tommy started working on grinding up tomatoes?

A Yes, there was.

Q Do you know when that was, approximately?

A What?

Q Do you know when that was, approximately?

A I can't quote exactly. I needed tomatoes to make a milanese sauce, so he was grinding tomatoes up to make milanese.

Q Was he grinding tomatoes on what they call a "Hobart machine"?

A That's correct.

Q I show you these two photographs and ask you to kindly look at them and tell me whether or not they fairly and accurately represent the kitchen, how it looked in general, on the date of the accident, and the placement of the Hobart machine and the Hobart machine on the date of the accident? Take your time and look at them, please.

(Pause.)

A Yes, I would say that's a similar machine. It is the same type machine that I used.

MR. NAPOLI: I offer them in evidence, your Honor. They were previously marked as 5A and 5B.

THE WITNESS: That's the layout of the kitchen, the way the kitchen was laid out.

MR. BARTLETT: No objection, your Honor.

(Plaintiff's Exhibits 5A and 5B for identification received in evidence.)

Q Can you tell me how high this particular machine is in terms of from the floor to the lip of that pan? If you know.

A I would say it is between 46 and 47 inches.

Q Less than four-feet high?

A Approximately. It is close to four feet.

Q The pan that sits on top of that machine, I'd like to show you this photograph and ask you whether or not this is a fair and accurate representation of the pan, at the time of the accident, that sits on top of the machine?

A Yes, it is.

MR. NAPOLI: I offer that in evidence.

MR. BARTLETT: No objection, your Honor.

(Plaintiff's Exhibit 5E for identification received in evidence.)

Q Will you take a look at this pan and tell us where the hole -- can you describe to the jury how this pan is set up on the machine and why the hole is off center?

A The reason why the hole is off center on this pan is because you usually place your foods or whatever objects

you are grinding in the back of the pan, so this is towards your front; so you move this towards your front and you use what you call a "stomper" or a "plunger." It is called a "stomper" or a "plunger." It can be made out of wood or it can be made out of plastic. Now usually all of them are made out of plastic because it is cheaper to make them out of plastic.

You move your food forward, usually with your left hand, if you are right-handed -- I mean if you are left-handed, you move them with your right hand and use your stomper to push it down through. When you use the liquid-type tomatoes or something like that, usually you can just move them forward and they will go down through the hole without much problem. Sometimes you might run into one that is a little bit bigger than the others. It all depends on the size of your tomatoes, they will flow down there. If you try to force them too much, it will splash up in the air on you and then it will go all over the place. So, usually, you don't try to force-feed it. You let it gravity feed, what they call "gravity feed": run down towards the hole. You usually keep this towards the front. You are pouring stuff in there and you move it towards the front to go down the center of the hole into your worm gear.

Q Is this picture a fair and accurate representation of the hole into which the things in this pan go into in terms of this machine?

A Yes, it is.

Q And the various gears, whatever you call them?

A That's the worm gear.

Q One gear?

A A worm gear. A long piece of metal like this, what they call a "worm gear."

Q Is that the first gear you would come in contact with?

A That's the first gear you come in contact with. This is the worm gear down in here. It goes around and it turns the stuff forward and forces it out through your grinding blade. You have a blade in there. Then you have what they call a "face piece," and this is a face plate or you call it a "face piece"; whichever you prefer to call it. Then your blade fits tight up against this plate or face piece, and this is what does the action of it: the worm gear moving it forward and your blade that fits tight against your face piece. This is the action that gives you -- to force it out through the holes and your face piece. You have variable, different sizes of face pieces.

MR. NAPOLI: I offer this photograph in evidence, your Honor. This is 5D.

MR. BARTLETT: No objection, your Honor.

(Plaintiff's Exhibit 5D for identification received in evidence.)

xx

Q Mr. Gokay, when Tommy was testifying, he talked in terms of some kind of a suction action, in terms of this machine. Is there some kind of -- when these gears or blades are in operation?

A Yes.

Q I assume this thing is operating by a switch, is that correct?

A That's right.

Q It is continually moving if the switch is on?

A Right.

Q Can you tell me what he meant, if anything, with respect to this suction effect?

A Shall I detail it?

MR. BARTLETT: Objection, your Honor, to the form of that question: what another witness meant.

THE COURT: Yes.

Q You describe to us, if you are familiar with such a suction machine --

A I have operated these type of machines going on 33 years, so I think I know what kind of an operation they perform.

When you are operating the machine, if you are grinding meat in it, you have to force this meat into it because your meat will not flow into it. It has to be moved forward, and use a stomper or a plunker, as I stated before. If you are grinding some type of liquid through it, which tomatoes are a liquid, you try to take some of the liquid out of them, but you can't get all of it out because if you do, you are not going to get the effect of it that you need. So, in fact when this is going down through, it will form a form of suction like a whirlpool, almost, and this sucks them down in there. If it didn't form a whirlpool, it would suck the action into the machine without being forced down in there.

Like I stated before, if you use a stomper, you are going to splash it up in the air.

Q So there are things on the back of this pan, as it is coming down, you do have this suction action?

A That's correct. You pour the tomatoes in there, and they will go down by themselves, except for a few that stay on the side, and you push them down. It forms a suction there, like a whirlpool, when they get down in there. You can see them turning because of the worm gear in the machine.

THE COURT: That's if the tomatoes are liquid?

THE WITNESS: Yes.

THE COURT: They have to be mushy to do that?

THE WITNESS: Yes.

THE COURT: If you drop in solid tomatoes, there won't be any suction? Will it feed down by gravity?

THE WITNESS: Yes. You usually dump in a can of tomatoes; you dump the whole can.

THE COURT: Is that the form the tomatoes were in at the time of the accident? They were canned tomatoes?

THE WITNESS: He had them stacked up on the side.

THE COURT: In other words, they weren't fresh tomatoes; they were canned tomatoes?

THE WITNESS: Yes, they are canned tomatoes in a can.

Q So you were using the kind of tomatoes that would give you this kind of action?

A Yes. I am not saying it is a real forcible force, but it is a force. Any movable object is a force.

Q These tomatoes -- and you have worked on this kind of thing, I assume, putting tomatoes of this kind in the machine -- would that create a slippery surface in and around the pan?

A It certainly would.

Q Plaintiff's Exhibits 5A and 5B show some kind of

a floor. Can you describe that floor for us?

A This floor is made out of tile, square tiles, approximately five inches in diameter a piece, with a cement filler in between them. When you spill any type of liquid on them, they are very slippery.

Q I was going to ask you--Mr. Marcantonio described it as a "non-skid floor" in his deposition.

A It is a non-skid floor as long as nothing is on it. Something in liquid form in it -- in fact, when I worked behind the range, I didn't have no boards or anything like that, and when I was working behind the range, I used to use what they call "kosher salt" because it was a cold, coarse-grain of salt, and I used to throw it on the floor so I wouldn't slip when I was working behind the range.

Q So if something like tomatoes are on the floor, it will make the floor slippery?

A It doesn't make any difference what kind of liquid, you spill water on it, it is slippery. Grease, water; it makes it slippery.

Q Do you know from the lip -- excuse me, the mouth, I think would be a better description -- this opening in the pan, you say the front part would be here, from the mouth down to those gears you described; how far would

that be?

A Would you rephrase that a little bit? Let me see the photograph. Explain it in a little more detail.

Q Referring to Exhibits 5E and D, from the mouth of this opening --

A You mean over the lip more from the mouth -- actually from the mouth, the top down?

Q Inside the pan. You have the pan. I am not talking about the lip of the pan. From the inside of the pan down to these gears you are referring to or rotaries, how far would that be?

A I would say, measuring my own fingers, I can touch -- because I stuck my fingers down in it like this, the tip of my fingers will touch the worm gear, barely, with my thumb open.

Q About four inches?

A If I squeeze it, I can put it down in there. So I would say, from the tip of my longest finger back to the space of my thumb, whatever measurement that would be. I'd say it is about four-and-a-half inches, approximately.

Q How wide would this opening be here, this mouth here? What would be the width of it across?

A The opening of the mouth?

Q Yes.

A I would say it's approximately three inches, or a little more, possibly. But I'd say it's approximately three inches. I never went to measure it, but I'd say it's approximate.

Q You could fit your hand in it, is that correct?

A Yes, you can.

Q You told us that on the day of the accident, that Chucky was working in the refrigerator and it was the time when Tommy was working this Hobart machine.

Did there come a time when an accident occurred with respect to Chucky's left hand?

A Yes.

Q When were you first aware that an accident had occurred?

A My back was to the machine. I was working against the wall, opposite the machine, as indicated in the photograph here. The photograph is like this. I was working on this side of the kitchen, on a workbench, cutting veal. I was cutting down a leg of veal.

Q So you had your --

A I had my back to that.

Q To the scene shown in 5A?

A I had my back to the machine. I did not actually see the accident happen. The first time I was aware it

happened, my son come over and say, "Chucky had an accident." He had him by the hand and he showed me the hand. I said, "Oh, my God." The first thing I did, I put a tourniquet around his hand, with my fingers, I just gripped his wrist.

Q The first time you were aware an accident had happened was when Tommy brought Chucky over to you?

A That's correct.

Q What did you see at that time?

A All I could see was the flesh and the tendons, and everything, hanging out of his fingers.

Q What was the condition of Chucky at that time?

A He was white as a ghost. That's all I remember.

Q Did he say anything to you?

A He couldn't even talk. You know, he just stood there and stared, that's all.

Q After you say you put a tourniquet -- where did you put the tourniquet?

A I grabbed him by the wrist, just above the hand. I was in the Service for 22 years, and I know how to take care of wounds, and stuff like that; I did it many times.

Q After you put the tourniquet on Chucky's arm, what was the next thing that you did?

A I turned around and I told Bert--I refer to Bert, Bert Chivarou --

Q Mrs. Chivarou.

A -- "Get me a towel, dampen a towel. Just get me some dry gauze of some kind to put over his hand and cover it and pack it so we can stop the bleeding." While I had it on, I had to release it every so often. You have to release it every 15 minutes. If you don't, you can cause permanent damage.

Q Who was in the kitchen, as far as you knew, when this accident occurred?

A As far as I can remember, Bert Chivarou was up at the cash register, as far as I can remember; and Tommy was beside me with Chucky; as for anybody else, I can't exactly remember. After I seen that, I didn't know what to do.

Q You were quite upset, to say the least?

A Who wouldn't be.

Q What happened after that? Did you go to the hospital?

A Well, I'd seen enough of them, even though it was my own kid, that I knew enough to take care of it before anything else happened. We got together and Marc said, "We will get the car. I will take him to emergency down at St. Francis'." Then I don't exactly remember anything after that. All I wanted to do was just make sure that I

stopped the bleeding and took care of it.

Q You didn't see the accident happen?

A No, I did not.

Q Did you talk to Chucky while you were going over to the hospital? Did you talk to Tommy about the accident?

A Give me a minute.

THE COURT: We will take a five-minute recess.

(Recess.)

Q Mr. Gokay, you said that Chucky was brought over to the hospital, St. Francis', by you and Mr. Marcantonio, is that correct?

A Yes, it is.

Q Going over to the hospital, did you have any conversation with Chucky?

A I just kept telling him, "Take it easy"; like that.

Q Was that the extent of the conversation you had?

A That's about all I could say, "Take it easy." He was white as a ghost. It seemed like he was in a state of shock, so there wasn't much sense trying to say something else to him.

Q When you got to the hospital, where did you go?

A Went directly to the emergency room.

Q When you got to the emergency room, did you

speak to anyone in the emergency room?

A Not too much I can remember about it because I was pretty shook up myself. As soon as I got in there, somebody was waiting there, and they got him on a table. I was still holding his hand until the nurses put compacts on it -- not compacts but compressors on it, put pressure on it to stop the bleeding.

Q In the emergency room, did they take any information from you with respect to the boy's name, where he lived, that kind of thing?

A All I can remember is just giving as much information as I could. What I said or did, I don't exactly remember. I can't say exact words I said or anything else.

Q In the emergency room record there is an exhibit --

A All I remember saying is, "He had an accident. He cut his fingers off in a food grinder." That's the extent; further than that, I don't remember what I said.

Q You didn't see the accident, is that correct?

A I didn't see the accident, so I couldn't state the facts of how it happened, or anything else. If I had been on the scene where I had seen it, I would have known what to say.

Q At that stage, Chucky didn't tell you how it happened?

A Chucky, to this day, hardly talks about it.

Q In the emergency-room record, there is a typewritten entry: "Father said child put his hand in meat grinder."

A I could have said that, yes. If I said the exact words, I don't remember. I might have stated it that way. I don't know.

Q Was anyone speaking to Mr. Marcantonio in the hospital, in terms of what had happened?

A He came in with us. He was very concerned, naturally, because I think he had very deep feeling for the boy, which I know he does today.

Q When you were in the emergency room, did you see what they were doing to Chucky's hand? What they were doing, if anything?

A Rephrase that, please?

Q Did you see what kind of procedures were being performed while he was in the emergency room?

A I stayed there and watched what I could, yes.

Q What Dr. Hsu described yesterday in terms of doing some kind of packing with the hand, was that some of the things you saw?

A I believe most of it was done over the telephone, telling them what to do, because they directly called him

as soon as we got in there, because there was no doctor there at the time to come in. The nurses were there, and there was some doctor come in -- I don't know who it was -- and they got directly in contact with Dr. Hsu, and he was the one. They asked me if I had any preferable doctor, and they said they had Dr. Hsu, a very reputable orthopedic surgeon, so I said, "Yes, I will take him," because I believed that he was competent. So I said, "All right, I will leave it in his hands."

Q So while you were in the emergency room, all of this was going on: They were trying to reach Dr. Hsu. You were concerned about Chucky's condition, I assume.

A I was more concerned with his well-being than anything else--to be concerned about anything else.

Q Dr. Hsu read yesterday from something he had in his records, something about Chucky helping in his father's butcher shop. You didn't own a butcher shop at that time, did you?

A I never owned a butcher shop in my life.

Q So that whatever or wherever Dr. Hsu got that history, he was mistaken, is that correct?

A That'a a misrepresentation of the case.

Q The part where it says: "He had his left-hand fingers cut on the meat grinder, losing all four fingers of

his left hand"; that was correct, though?

A That was correct.

Q His fingers were caught in some kind of a grinder?

A That's correct.

Q Did you stay there at the hospital that day?

A I stayed there until he went into surgery, yes, and I believe that I called my wife from the hospital. I don't remember exactly -- and she was working at her job at Deer Park Farms.

Q She came over --

A She did not come directly down. I told her there was no sense in her coming to the hospital right then, because she couldn't see him; because he was in surgery, as far as I knew.

Q How many children did you have living at home at that time?

A At that time? I believe I had six at home at that time.

Q You say that on that day, Chucky and Tommy were with you, is that correct?

A That's correct.

Q Were any of the children, other children, with your wife on that day? Do you recall?

THE COURT: His wife was at work.

MR. NAPOLI: Yes, I understand.

A I don't remember if she took any one of the children or she didn't, because my older daughter usually took care of them, if she wasn't --

Q What children were staying at home that day that weren't working?

A I don't know whether they were home that day or not. Maybe they went up swimming with my wife.

Q You had an older daughter at home to stay home and watch the younger children?

A Yes.

Q Who was that?

A Sharon.

Q How old was she?

A Eighteen.

Q What other children stayed at home that day or would have stayed home that day?

A Patricia, Dorothy.

Q Did you see Chucky after he came out of the operation that day?

A No. He was in recovery and we wasn't able to see him, I don't think, until the next morning. I am pretty sure it was the next morning before we was able to see him.

Q After he left the emergency room, he went into the operating room --

A He was under sedation, and everything else. I really don't recall. I don't believe we got to see him until the next morning. I think the next morning at approximately nine, ten o'clock, I believe, before we were able to see him.

Q I assume his left hand was all bandaged up, or something like that?

A Yes, it was.

Q Was he in any condition to talk with respect to anything?

A No, he was pretty shook up, more so than the day before, because he was starting to realize what had happened.

Q Did you see him the day after? This would be the 19th.

A Yes. We went to see him every day.

Q You saw him every day until he left the hospital?

A Yes.

Q During that period of time, did you talk to him about the accident?

A Yes, but he didn't seem to say anything. He didn't want to talk about it. Couldn't get anything out

of him about it hardly.

Q Did there come a time when you went back to the restaurant?

A Yes, I believe I went back to work -- it was either Thursday or Friday, I believe. I can't remember exactly.

Q Did you ever go back and look at that Hobart machine?

A I did.

Q Was that the same day or the day after the accident? When was that?

A Like I say, it was either Thursday or Friday.

Q The accident was on Sunday.

A Right.

Q When you went back --

A I was so shook up for about three or four days, that I couldn't work; and I called in and told him I wasn't able to come to work, because I just went to pieces.

Q When you went back the following Thursday, did you observe the Hobart machine?

A I did.

Q What was the condition of the machine at that time?

A It was still intact, the same way it was left.

Q On June 17th?

A That's right.

Q Can you tell us what you observed about the machine on Thursday, four days after the accident?

A I took the machine apart, was going to clean it. When I pulled it apart, there was his fingers in the machine.

Q This was on Thursday?

A That's right.

Q When you are referring to the "machine," you are referring to those parts shown in Plaintiff's Exhibit 5D, is that correct?

A That's right. It was down -- the fingers were down in this section of the machine here, towards the end of it, between the base of the machine and the chopper blade.

MR. NAPOLI: No further questions, your Honor.

CROSS-EXAMINATION

BY MR. BARTLETT:

Q Mr. Gokay, I think you told us that you started to work at Marc Antonio's Ristorante in March, 1973, is that correct?

A I did.

Q I believe you referred to being a chef for a

number of years?

A Yes, I have.

Q For how many years have you bee a chef?

A Since I retired from the Navy.

Q When was that?

A I retired from the Navy May 5, 1964.

Q You have been a chef then since 1964?

A That's correct.

Q While you were in the Navy, were you a cook or a chef at any time?

A I was a cook in the Navy, yes.

Q For how many years were you a cook in the navy?

A I first went in in 1942. I started out as a gunner's mate. Then I finished up as a cook. I probably was a cook in the Navy for the last 19 years.

Q I take it you were a cook for 19 years in the Navy? You were in, altogether, for 22 years?

A That's correct.

Q It is fair to say that your experience in the Navy was basically that of a cook?

A That's correct.

Q So you had 19 years experience as a cook in the Navy; and then since 1964 when you left the Navy, up until certainly 1973, you were continually a cook; is that right?

A A chef, yes.

Q One or the other?

A There is a difference.

Q Is it fair to say, sir, that as far as kitchens are concerned, commercial kitchens, that you were well-experienced with them?

A I am, yes.

Q As far as Marc Antonio's Ristorante is concerned, what type of cuisine did they serve?

A Strictly continental cuisine.

Q Is that what is known as like continental, "Northern Italian"?

A Strictly continental, according to European style. Not just Italian; it is European style.

Q So I take it, then, you are quite familiar with preparing sauces, and things like that?

A I certainly am.

Q Correct me if I am wrong, sir. One of the things you told us was that you were taking tomatoes -- withdrawn -- that your son Tom was taking tomatoes and putting them into this machine, is that right?

A That's correct.

Q Were these tomatoes whole tomatoes?

A They were whole tomatoes in a can.

Q I appreciate that, but they were whole tomatoes, were they not, sir?

A Yes, they were.

Q Of course, by this time in 1973, you had at least 20-years experience as, as you say,"a chef," is that right?

A Possibly more, yes.

Q And you were intending to make a sauce, is that correct?

A That is correct.

Q Isn't it a fact, sir, that if you were intending to make a sauce, you wouldn't grind whole tomatoes, because if you do that you get the pits in the sauce, don't you, the seeds?

MR. NAPOLI: I object to the relevancy of whether you get pits in the sauce, in terms of this particular case, your Honor. It is going far afield in terms of materiality and relevancy.

THE COURT: I will permit it. I assume there will be some connection.

Q Sir, if you grind tomatoes, you get all the seeds cut up, don't you?

A Yes, you do.

Q As a chef, did you want to get the seeds cut up

in the sauce?

A Yes, I do.

Q For how long have you been doing that in preparing your continental meals?

A Quite a few years.

Q It is probably faster to put the tomatoes whole into a grinding machine than to slice them by hand and remove the seeds, isn't it?

A Will you rephrase that, please?

MR. NAPOLI: Your Honor, I object to the relevancy of this.

THE COURT: I sustain the objection as to that. No one suggested the other was a viable alternative.

MR. BARTLETT: Your Honor, will you take this subject to connection? It is not just an idle question.

MR. NAPOLI: Your Honor, I object to --

THE COURT: It is self-evident that it takes less time to feed tomatoes into a grinder than it does to slice them up and take out the seeds.

MR. BARTLETT: If it is self-evidence, everyone agrees with that, I will withdraw the question and keep on going.

Q You agree with that?

A Could I ask you a question, please?

THE COURT: No, you may not.

Q I am afraid you can't. Sir, let me go on, then.

As of March, 1973 when you were employed as a chef, your duties as a chef, did they require you to supervise the running, in terms of the preparation of food, the kitchen?

A That's correct.

Q Correct me if I am wrong, sir. Is it fair to say that a chef would have overall control of the other people who are in the kitchen, as far as assigning them duties and seeing that those duties are carried out correctly.

A That's correct, under conditions, yes.

Q They were the conditions that you were working under, is that correct?

A Correct.

Q If I can use a Navy expression, you were "the captain of that ship," right?

MR. NAPOLI: I object, your Honor, to "the captain of the ship."

THE COURT: It seems unnecessary. He was in charge of the kitchen. There is no dispute about it.

Q Sir, I think you told us that there came a time when your son Bryan -- and just so I understand you, of the three boys -- Chuck, Tom and Bryan -- Bryan would be

the oldest, is that right?

A Yes, he was.

Q He was working at the restaurant, you said, for a period of time, is that correct?

A That's correct.

Q When did he start there, sir?

A I don't have any recollection of the time. It is three years back. I don't remember exactly, no.

Q Let me have your best recollection, sir. Was it before or after this incident involving your son Chuck?

A I believe he worked there before.

Q Did he work there afterwards?

A I don't recollect at the time, no.

THE COURT: You are talking about Bryan?

Q I am talking about Bryan. You understood we are talking about Bryan?

A I understand who you are talking about.

Q When Bryan worked at the restaurant, what were his duties?

A He worked with me as, what you would call, a "second cook."

Q What did that encompass, sir?

A That can incorporate many duties: preparation of food, working a broiler, and things of that nature.

Q Did you hire him?

A I brought him over to talk to Mr. Marcantonio, and he talked to him. I told him he had to talk to him. If he wanted him, all right. He was agreeable with me, if I wanted him, as long as he was capable of doing the duty.

Q As far as you were concerned, he followed whatever instructions you gave him during the course of his employment, is that right?

A That's right.

Q Was he employed on a five-day-a-week or a six-day-a-week basis?--I am talking about Bryan, now.

A Repeat that, please?

Q As far as your son Bryan was concerned, was he employed five or six days a week?

A He worked as many days as I did.

Q So whenever you were there, Bryan was there?

A He usually worked with me, yes.

Q How about you? Did you work a five- or a six-day week?

A At that time I believe I was working six days.

Q I think you indicated to us that when Bryan was paid, he would be paid by check, is that right?

A He could have been paid by check or he could be

paid by cash. Sometimes he was paid by check, other times he might have been paid by cash, but he did get a check at times, yes.

Q Let me ask you this, sir. When you were paid, were you paid by check each time?

A I was usually paid by check, yes.

Q At the end of the year, did you receive a W2 form? You know what a W2 form is, don't you?

A I certainly do.

Q At the end of the year, did you receive a W2 form?

A Yes, I did.

Q Did Bryan receive a W2 form?

A I do not recollect whether he did or not. I didn't inquire into his business, because he was old enough to take care of his own business.

Q Let's talk about Tom. Is it your testimony that Tom was employed at the restaurant?

A Yes, he was.

Q When did Tom first become employed at the restaurant?

A I would say, off and on since April, as I recollect, my nearest recollection.

Q You say Tom was there in April? What was he

doing? What were his jobs?

A He usually -- if he was around, he was washing pots and pans or dishes, working outside, whatever he had to do.

Q Was he under supervision?

A He was under my supervision when he was in the kitchen, yes.

Q Just so I understand, Mr. Gokay, when I say "under supervision," I am not talking about father and son; I am talking about chef and a kitchen helper. Is that what you are meaning, too?

A That's what I refer to, yes.

Q How many days a week did Tom work?

A I don't recollect exactly. He come over sometimes after school at night if we needed him, and then he worked weekends off and on.

Q So would it be fair to say that Tom was not working every day?

A No, not every day, no.

Q As far as the restaurant was concerned, it was open six days a week, was it not, sir?

A Yes, it was, at that time.

Q The day it was closed, would that be Monday?

A I believe we were closed on Monday or Tuesday.

I don't recollect exactly which day it was. I believe it was on Monday. I am not sure.

Q I take it that as far as you were concerned as a chef, when you prepared your food each day you used clean pots, did you not?

A That's exactly correct.

Q Was there a pot washer there?

A When we could get one, yes.

Q Tom wasn't working there all the time, is that right?

A That s correct.

Q Is it fair for me to assume that there was another pot washer around there, since you did work with clear pots?

A Me.

Q That was you?

A I worked pot washer. I did everything.

Q How about Bryan?

A He helped out, too. We both did the same thing.

Q Does the name "Jose D'Augerra" mean anything to you?

A Yes, it does.

Q Did Jose D'Augerra work at the restaurant?

A I don't exact know his last name, but I recognize

the name "Jose," and Jose was a waiter in the restaurant, yes.

Q Before Jose was a waiter, did he have another job at the restaurant?

A He might have, before I took over.

Q You have been there since March. Let's talk about since you were there. Did he have another job before he was made a waiter since you were there?

A The Jose I am talking about is the one that was a waiter when I went there, and he was still a waiter. Whether there was somebody else named "Jose," I don't recollect. I want to get it straight on the record.

Q As far as Tommy was concerned, your son Tommy, in 1973 he was how old?

A He was 14 going on 15.

Q Your son Chuck was 12 at the time?

A That's correct.

Q Did there come a time when you brought Chuck down to the restaurant?

A There was, yes.

Q When for the first time did you bring him down to the restaurant in terms of having him do any work?

A That, sir, I can't recollect exactly.

Q Could you tell us by month?

A I believe it was sometime in May when he come down to work.

Q When you put him to work in May, what was he working as?

A He come down. He just had to mow the lawns, and stuff like that, work around the outside. Then he come in the kitchen and he would walk around and go get stuff, and like that, in the storerooms, and cleaned up, or something like that, or wash a pot or pan or something, if I needed it.

Q So I take it, then, that when you initially brought Chuck down in May, he would be working in the outside, tending to the lawn, or something like that, from what you tell us, as far as his initial duties are concerned; is that right?

MR. NAPOLI: Objection, your Honor. He already testified to more than just mowing the lawn. He testified to being in and out of the kitchen. I object to the question. It has already been asked and answered.

MR. BARTLETT: I respectfully submit, your Honor, Mr. Napoli didn't hear the entire question.

(Record read.)

THE COURT: He is talking about"the initial duties when you first brought him down."

MR. NAPOLI: Can we have the previous question and answer read back?

THE COURT: I remember the previous question and answer.

A When he first come down -- what was that again? Repeat that question again.

THE COURT: I will rephrase it.

When you first took Chucky down there in May for the purpose of doing some work, were his first duties only in connection with mowing lawns?

THE WITNESS: That's what he was doing initially, yes.

THE COURT: Then did there come a time when he started doing some work inside?

THE WITNESS: That's correct.

THE COURT: How long after you first brought him down there to work, did he start doing some work inside?

THE WITNESS: I don't recollect right offhand, Judge. It might have been two, three weeks, something like that.

THE COURT: Go ahead.

Q Sir, if you had Chuck working two or three weeks after you first brought him down, and Thomas was also working, is it your testimony that you had Bryan, Thomas

and Chuck working there all at the same time?

A No, they weren't all working at the same time after Bryan left, no.

Q Of course, I am talking about before Bryan left. Was there ever a time when you had the three boys working there?

A I don't remember right offhand, no. They could have, yes, but I don't remember exactly.

Q When Bryan was there, he was an assistant cook, you said, and a pot washer; right?

A I said he was my second cook, and him and I did things together.

Q Didn't you also say he was a pot washer?

A I was a pot washer, too; so he was a pot washer, too.

Q That's my question. He was also a pot washer, right?

A Yes.

Q And Tom was there at the same time, and you had him as a pot washer, is that right?

A Tommy worked as pot washer, yes, when he come down.

Q You are now saying that Chuck was there, too, and some of the things he did was also to clean up pots, is

that correct?

A He worked around the kitchen, yes.

Q Just so I understand you. According to you, at times you had three pot washers there, all three of your sons, right?

A Would you rephrase that again, please?

Q Sure.

Just so I understand you, sir, then, I take it at one time, you had all three --

A I did not say that I had three pot washers at one time.

Q Sir, Bryan was a pot washer --

THE COURT: That's enough. Don't go any further.

MR. NAPOLI: Your Honor, this is unfair. I object.

THE COURT: This is not a fair statement of his testimony, so don't ask it.

THE WITNESS: He is trying to harass me with the question.

THE COURT: He is not trying to harass you, but I am not going to permit the question that he started.

MR. BARTLETT: Would you ask Mr. Napoli, if he has these explanations, that he try to withhold them?

MR. NAPOLI: Your Honor, I was just getting up

to object.

MR. BARTLETT: It was a little more than that.

MR. NAPOLI: The statement was unfair, your Honor.

THE COURT: I think the testimony is clear.

Q At the time that Bryan was there, what was Chuck doing?

MR. NAPOLI: Objection, your Honor. When? I think we went over this several times now in terms of him being there at different times.

THE COURT: I have a feeling that it is clear, but I will permit this one question.

A When Bryan was still there, he was outside working.

THE COURT: Was he working at all inside, while Bryan was still there?

THE WITNESS: He would come in once in a while, but he would just run around for me, or something, getting something in the storeroom, or something of that nature.

Q Other than coming in to get something from the storeroom, he wasn't working inside while Bryan was there, is that correct?

MR. NAPOLI: Objection, your Honor. Already asked and answerd in the last question as to what he did.

THE COURT: This is a clarification. I will permit it.

Q Sir?

A Repeat the question, please.

(Record read.)

A Not to my recollection, no.

Q Let me direct your attention to June 17, 1973. On that day, you went to the restaurant and you said you had your son Tom and your son Chuck, is that correct?

A That is correct.

Q You were starting to prepare once you got there for the customers who would be coming in during the day; you were starting to do whatever you do to prepare the meals; is that right?

A That's right, yes.

Q I think you told us that there came a time that your son Chuck had come in from what you said what might have been "mowing the lawn," is that correct?

A That's right, yes.

Q At the point that your son Chuck came in from mowing the lawn, what duties had you assigned to your son Tom?

A First he had everything cleaned up, and then he was grinding tomatoes on the Hobart.

Q This Hobart machine, sir, it is quite heavy, is it not?

A Yes, it is.

Q You certainly couldn't pick it up, could you?

A I don't believe I could pick it up by myself, no.

Q Is it fair to say that it remained in one portion of the kitchen?

A That's correct.

Q And I think you identified one of the pictures today: where it remained; is that correct, sir?

A Yes, it is.

Q That was over in the corner next to or near the door where it said "Exit," is that right?

A It was not in the corner. It was out towards the middle of the room, about eight feet from the wall.

Q Let me ask you this, sir. I show you Defendant's E in evidence. Does it show where the Hobart machine was?

A Yes, it does.

Q Is that the position that it was in?

A That machine in this picture looks like it is turned a little bit.

Q Let me look at the picture that you identified today.

MR. BARTLETT: Mr. Napoli, may I have the picture that your witness identified today?

Q Sir, I show you Plaintiff's Exhibits 5A and 5B in evidence. Are they the pictures that you identified for your attorney, Mr. Napoli, here this afternoon?

MR. NAPOLI: Conceded, your Honor.

Q Is that the position -- when you told us that the kitchen was in that position at the time, that included the Hobart machine, didn't it?

A This Hobart machine was usually in this position, flat up against this refrigerator, up against the back of this refrigerator, in this position here.

Q Is that right near where it says "Exit"?

A There is an exit door up here, diagonally up from it, yes.

Q About how far from it?

A I would say from the exit sign to the machine was approximately ten feet.

Q Sir, what I would like you to do is this. Do you see the door that that exit sign controls -- if we can use that expression?

MR. NAPOLI: Your Honor, can we have a reference to the exhibit that's being used now so we can clear up the record?

MR. BARTLETT: Yes, Plaintiff's Exhibit 5A.

A There is a doorknob on th doc .

Q How far is that door from the machine?

A I would say the door is approximately nine feet.

Q So is it fair to say that the machine is over in the corner of the kitchen?

A It is a section of the corner, yes. It is still not the corner.

Q It is a section of the corner but not the corner, is that what you are saying?

A Yes.

Q Let me use your words, sir: "It is over in a section of the corner." This is where your son Tom was using the machine, is that right?

A That's correct.

Q I think at this time you told us that you were cutting veal, is that right?

A That's right.

Q You told us that when you were preparing the veal your back was turned to your son Tom, is that right?

A That is correct.

Q Let me show you Defendant's Exhibit E in evidence, which was shown to your son Thomas this morning. In Defendant's Exhibit E in evidence, do you see two

carving blocks?

A I see a carving block, yes.

Q Do you see two of them?

A The one on this end and one on that end.

Q Two of them?

A That's right.

Q Do you see the knives next to them?

A That's correct.

Q Are they what you might call "chef's" or "butcher's" knives?

A They can be that, yes.

Q Were those two carving blocks, as depicted, there on June 17, 1973?

A One of the carving boards was against the wall on the other table.

Q Are you saying that that photograph that your son Tom saw this morning is not representative of what was there on June 17, 1973?

A This is representative of the restaurant layout, yes.

Q If you were working at either of those two cutting boards with the knives in the picture, would your back be towards the machine or would your face be towards the machine?

A I was not working at them two cutting boards.

MR. NAPOLI: Objection, your Honor. He already testified he was working in another area of the room, your Honor.

THE COURT: He answered. If you hadn't spoken, the jury would have heard his statement.

THE WITNESS: I was not working on one of these two cutting boards facing that way. My back was towards you, on another table against the window.

Q Was there another cutting board over there?

A I don't recollect if there was another cutting board or I moved it, because I had light there. Instead of turning the lights on overhead, I had lights from the window there and I could look out the window.

Q Sir, let me ask you this. In that picture with the cutting boards, there is a light directly over the cutting boards, is that correct?

A That's correct.

Q So as it stands there, you certainly have plenty of light if you are using those cutting boards, is that right?

A I preferred to cut it near the window.

Q I see. So what you are telling us, sir, is that you moved one of these cutting boards over to another

location?

A That is correct.

Q Is that correct?

A Yes.

Q I see.

Is it correct to state that in the position of those cutting boards, which your son Tom identified this morning, if a chef is standing at those cutting boards, he is facing the Hobart machine, isn't he?

A Yes, he is.

MR. NAPOLI: Objection to the form of the question. There was no identification by Thomas as to where the cutting boards were the day of the accident. He said it is the general layout of the kitchen. That is an unfair inference, your Honor.

MR. BARTLETT: If I may, I believe these photographs were identified this morning by Thomas Gokay, as a fair and accurate representation of the kitchen, as how it looked on June 17, 1973.

THE COURT: I am going to sustain the objection. This is al totally irrelevant. He said he was using a cutting board at that time facing in the opposite direction.

Q Sir, on that day there were only two cutting boards in the kitchen, is that correct?

MR. NAPOLI: Objection, your Honor. Already asked and answered. I object to the relevancy and materiality.

THE COURT: He said he moved one of the cutting boards over near the window. I don't know why you are belaboring this point at all. To keep on belaboring it is inexcusable.

Q Let me ask you this, Mr. Gokay. When your son Tom was using the machine, was he using it under your instructions?

A I told him to grind the tomatoes, yes.

Q When he was grinding the tomatoes and you were at the cutting board, wherever it was, cutting up the veal, what was your son Chuck doing at that time?

A When I first started cutting veal, I was watching him out the window mowing the lawn, because that is what I usually did.

Q Did there come a time that he came in from mowing the lawn, from what you tell us?

A Yes.

Q Did you indicate that, at this time, you told your son to clean out the icebox and straighten things up?

A He come in and asked me what he could do next, and I told him to clean out the iceboxes, wipe up the

floors, and stuff like that.

Q Let me ask you this, sir --

MR. NAPOLI: Your Honor, can he finish answering the question?

THE COURT: I think he did finish.

Didn't you finish?

THE WITNESS: Yes, I did.

Q Let me ask you this, sir. As an experienced chef of 10, 15, 20 years, whatever it was, you were aware, of course, that you were just starting the preparation of food for the dinner trade coming in that afternoon on Sunday, right?

MR. NAPOLI: I object as to what time. He has already testified that at one o'clock the restaurant opens. I object to the relevancy of this also, your Honor. I think we are wasting a lot of time on cutting blocks and the dinner trade and seeds and tomatoes. I object.

THE COURT: I will permit the question.

(Record read.)

THE COURT: I sustain an objection on different grounds. The reference to 10, 12, 15 years' experience has nothing to do with his knowledge that he was starting preparation of the food.

Rephrase the question.

Q You were aware that the dinner trade was coming in that very afternoon. You were starting to prepare your food for them, is that correct, sir?

A I gauge my time according to the way I feel like it, on my gauge of business, and such, when I work in the restaurant.

THE COURT: The question really is this. Let me rephrase it.

As of one o'clock, were you preparing food for the customers that were going to come in that day?

THE WITNESS: No, I was not. I was getting ready for a later time.

Q Sir, isn't it a fact that when one cleans out the refrigerator and straightens it out, it is done at the end of the day and not in the beginning of the day when the customers are ready to come in?

MR. NAPOLI: Objection to relevancy and materiality, your Honor.

THE COURT: Sustained.

MR. BARTLETT: Your Honor, may I be heard briefly on this at the side bar?

THE COURT: Not on that point, no.

MR. BARTLETT: May I make my record on that, nunc pro tunc, at a time convenient to the Court?

THE COURT: You may.

Q Where was the refrigerator, physically, located?

A What refrigerator are you referring to?

Q The one that you had your son cleaning out, as you say.

A The walk-in cooler.

Q I am sorry, sir?

A The walk-in cooler.

Q I say, where was it, physically, located?

A Directly to my right, as I was facing the window cutting veal, down the hallway.

Q Where was the bathroom located?

A The bathroom was located near the end of the passageway.

Q Near the end of the what, sir?

A Passageway.

Q Can you see it on that picture that we had discussed before, labeled Defendant's E in evidence?

A No, you cannot.

Q Can you see the passageway?

A No, you cannot; not in the picture, you can't.

Q Let me show you 5A. Can you see either the bathroom or the passageway in that picture?

A No, you cannot.

Q Can you see it in 5B, either the bathroom or the passageway?

A No, you cannot.

Q Was there one refrigerator or more than one?

A There was a walk-in cooler and a freezer--walk-in freezer

Q Where were the sodas kept? In the cooler or the freezer?

A The sodas were not kept back there.

Q Where were the sodas kept?

A At this end of the kitchen.

Q Were they kept in a refrigerator?

A Sir, they were up here. Do you want to refer to the photos, please?

Q Were they kept in the refrigerator? That's my question.

A The sodas were kept in the back room. They weren't kept in the refrigerator.

Q Sir, as far as the back room room is concerned, could you tell us: Can you see the passageway leading to the back room?

A No, you cannot.

Q In terms of the back room, sir, where was the back room in relationship to the Hobart machine?

A Over against this wall in the picture, where the photo is facing this way, sir.

Q So it would be against the opposite wall, is that correct?

A You would have to go around -- this photo here, you can tell better by this exhibit here, Exhibit E. Come around here; you see this closet here? Just after this closet around here, the hallway went down that way, what I call a "passageway." That's the terminology I use from the Navy.

Q Could you put an arrow with a red pencil, indicating the direction that you are talking about on this photograph labeled Defendant's E in evidence?

A Out here and then down. Do you understand that?

Q This is the passageway to what, then? The bathroom or where you kept the sodas?

A This here -- the cold soda was not kept there.

Q My question to you is this: That passageway leads to what, sir?

A This passageway leads to the refrigerators, the walk-in coolers and the back room where they kept beer, and soda; like that.

Q Could you show us the direction where the bathroom was?

MR. NAPOLI: Your Honor, I think this has been asked and answered: Where is the bathroom, the back room? I think it is irrelevant and immaterial. I think we have had enough of it.

THE COURT: Let's let him proceed.

Q Can you show us where the bathroom was in the direction you have on the pictures?

A You have the arrows down the same way.

Q It is the same corridor?

A The same corridor.

Q Do I take it, sir, is it fair to say that if you were going from the bathroom to get a soda, you wouldn't be going over near that Hobart machine, would you?

MR. NAPOLI: Objection, your Honor. It assumes a state of facts that doesn't even exist.

THE COURT: I assume there will be some connection later on.

Do you understand the question?

THE WITNESS: I don't understand the question because it is a repeat, and it is not anything to do with the picture whatsoever.

THE COURT: The question is, if someone were going from the bathroom to get a soda --

THE WITNESS: He would come through the kitchen

up to the bar.

THE COURT: He would come all the way through the kitchen?

THE WITNESS: To the bar. Not back to the back room.

THE COURT: In other words, he wouldn't go back and get a soda out of storage; he would go to the bar?

THE WITNESS: That's right, because they had ice up there and they had sodas there.

Q Where would the passageway leading to the bar be, sir, in that picture? Could you put an arrow on that?

THE COURT: Was there a passageway leading to the bar?

THE WITNESS: No passageway. You had to go through the kitchen, Judge. Right from here, you come up through here, behind this table, past this part right here. The bar was right up in here.

THE COURT: That's to the right as viewed in Exhibit E, correct?

THE WITNESS: That's correct, Judge.

Q If one was going from the bathroom to the bar, would they go past the Hobart machine?

A They would, yes.

Q In the corner?

A Just draw a line here --

MR. NAPOLI: Can he hold it up and show the jury?

THE WITNESS: You come around this table. There is a narrow passageway,between this table and the cook's station here, all the way back here. You got to come right in front of this -- this will show you a better diagram, past this sink at the end of the table. You come over here. Here is the grinding machine here. It all depends on where you walk.

Q Now you are talking about 5B, is that correct?

A That's correct.

MR. NAPOLI: He was talking about two photographs, your Honor.

THE WITNESS: You have two photographs.

Q Wait a minute. You just picked this one up. This is 5B, is that right?

A I give you this as a better example of where they come through between the tables.

Q And you are talking about 5B?

A And this one here, where you come up to the passageway.

THE COURT: He is talking about both of them.

Q The one you said was a better example, is that

5B?

A This is a better example of where you come through the passageway here. Then this gives you an example of when you come around the table past the machine; because the table runs down here, the machine is down here.

Q Let's take a look at E now. Isn't it a fact that E shows you one table in its entirety? Is that correct?

A It shows the entire table, yes.

Q Sir, there is a passageway at the end of that table before the other table? There are two tables, isn't that correct?

MR. NAPOLI: Objection, your Honor, to the form of the question.

A There is one table. One table here. Then you have to come around.

THE COURT: There is one table that forms sort of an island in the middle of the floor?

THE WITNESS: That's right. That's this table here.

THE COURT: If you are coming from the bathroom, you could walk around that table in either direction?

THE WITNESS: That's correct, your Honor.

THE COURT: You could walk around in a clockwise direction around it, in which case you would pass reasonably near the grinder in the corner; or you could come the other way around it, that is in a counterclockwise direction around it?

THE WITNESS: That's correct.

THE COURT: In which case, you wouldn't come anywhere near the grinder?

THE WITNESS: That's correct.

Q From what you told us there, you at the time of this incident had your back to everything -- withdrawn -- had your back to the machine, correct?

MR. NAPOLI: Objection. Already asked and answered three or four times.

THE COURT: Sustained.

Q Is it your testimony that your son slipped when he went near the machine?

THE COURT: He didn't testify at all. He said he didn't know how the accident happened.

Q Sir, after the accident was all over and after your son was all taken care of and he was out of the hospital, did you ever talk to the other boy Tom and say, "Tom, what happened?"

A I spoke to him, yes.

Q Did your son tell you?

A He said he actually didn't see it.

Q Did your son Tom tell you?

A He said he actually didn't see it when it happened. All he seen is when he turned around, his hand was in the machine, he was off balance. That's exactly what he told me.

Q Did you tell us this afternoon that the first thing you knew about this incident--this accident, was when Tom brought over your son Chuck to you and in effect said, "Dad, Chuck's had an accident"?

A That's correct, yes.

Q Sir, at any time did you ever hear the boy scream when his hands were caught in this machine?

A I did not hear --

MR. NAPOLI: Objection. There was no testimony that his hands were caught in the machine, your Honor.

THE COURT: Well, his hand.

Q Hand.

Did you ever hear a scream or a cry of any type?

A I did not hear nothing until he brought him over.

Q Did you have anything on in that kitchen, like a radio or a television or anything like that at the time?

A No, I did not.

Q Was there muzak or anything like that piped into the kitchen?

A I don't recollect whether it was or not.

Q Sir, I think you told us that there came a time that you went to the emergency room of St. Francis' Hospital and at the emergency room at St. Francis' Hospital you were asked various questions, concerning the prospective admission to the hospital of your son Chuck; is that right, sir?

A They asked a certain amount of questions, yes.

Q Did you indicate that you gave them as much information in the emergency room as you could?

A I indicated that, yes.

Q Did you identify yourself as the boy's father?

A I did, yes.

Q Was it to the person you identified yourself to as the father, that you gave this, as much information as you could?

A I believe it was, yes.

Q I think you told us, and correct me if I am wrong, that after the accident was all over, there came a time that you looked at the machine to see where the -- did you say it was a worm gear?-- worm gear was, in relation

to the pan, is that right?

A I didn't say which way or other.

Q I am sorry, sir, I thought you did. Did you ever look at the machine to see where the worm gear was?

A I know where it is. I don't have to look at it. I can tell you exactly where it is.

Q Did you ever tell us that you put your own hand down?

A I believe -- I don't recollect that question. I don't remember exactly if I did or not.

THE COURT: You did say that with your thumb open your fingers would just touch the worm.

THE WITNESS: Yes, you could just about touch the thing, approximately come near it.

Q You did that yourself, right?

A Right.

Q That's when the pan was on the machine, right?

A That's right.

MR. BARTLETT: Thanks a lot, sir. Nothing further.

THE COURT: Any redirect?

MR. NAPOLI: No, your Honor.

THE COURT: Thank you, sir.

(Witness excused.)

MR. NAPOLI: I call as my next witness, your Honor, Marcantonio.

A N T H O N Y D i M A R C A N T O N I O, called as a witness by the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. NAPOLI:

Q Mr. DiMarcantonio, are you the president of Marc Antonio's Ristorante, Inc.?

A Yes, I am, sir.

Q For how long have you been the president of that corporation?

A Since its very inception, in 1972, sir.

Q Have you had experience as an owner with respect to various restaurants prior to that?

A No, I have never owned a restaurant before, sir.

Q This was the first restaurant you owned?

A Yes, sir.

Q Prior to that, did you work in restaurants?

A I have worked in a restaurant prior to that, yes, that's right.

Q Can you tell us where you worked prior to that?

A Yes, Prudenti's Vicino-Mare, in Long Island City, Queens.

Q For how long did you work there?

A I guess I worked there for three or four years.

Q What did you do when you worked there?

A I worked as a cook. I did some baking. If I had to tend bar, I tended the bar. Whatever duties had to be fulfilled.

Q Prior to that, did you work in any restaurants?

A No, I don't believe I have.

Q Excuse me?

A No, I don't believe I have.

Q On June 17, 1973, who was the cook -- do you remember June 17 -- withdrawn.

Do you remember June 17, 1973?

A Yes, sir.

Q Father's Day, Sunday?

A Yes, yes, I do.

Q Do you remember who was the cook in the restaurant on that day?

A Clarence Gokay, Sr.

Q Do you recall whether or not back in June of 1973 the restaurant employed other help in the kitchen; just in general, in May, June, 1973, whether they used any other help in the kitchen?

A Yes, we did, sir.

Q Can you tell us what kind of other help they would use in the kitchen?

A Pot washer, dishwasher, kitchen-preparation man. That's the type of help we used, sir.

Q Do you recall being asked these questions and -- do you remember attending an examination before trial sometime in 1975?

A Yes, sir.

Q August 5, 1975?

A I remember attending a pre-trial examination. I don't remember the -- you know, exact date, but sometime in August of '75; that seems right, yes.

Q Prior to testifying here today, has your attorney shown you a copy of this examination before trial or deposition, and asked you to read it?

A I don't believe so; no, sir.

Q Since August of 1975, have you ever been shown a copy of this deposition and asked to read it or sign it?

A A copy was sent to me and asked that I sign it.

Q Did you sign it and return it?

A I did not sign it, no.

Q Can you tell us where that copy is?

A It is in the restaurant in Pennsylvania.

Q When was it sent to you to sign and return?

A I would imagine about four or five weeks ago, approximately. I am not sure of the exact date.

Q You never signed it and never returned it?

A No, I did not.

Q You never filled in the various spaces where they requested certain information from you, is that correct?

A No, I did not.

Q Do you recall being asked this question and giving this answer back, in August of 1975. Page 7, line 12:

"Q Besides a chef, did your restaurant employ any other help in the kitchen?

"A Yes, I did.

"Q Who were those other employees?

"A A pot washer and a cook's assistant."

Do you recall being asked those questions and giving those answers?

A Yes, sir.

Q So that besides someone washing pots, there would be a cook's assistant, is that correct?

THE COURT: That isn't inconsistent with what he

just said a few moments ago.

MR. NAPOLI: Maybe I misunderstood.

THE COURT: You must have. My notes are that he said "pot washer and someone else helping the cook."

MR. NAPOLI: I am sorry, your Honor.

Q Who was the cook on June 17, 1973?

A That's the day in question, is it not? June 17th, yes, that's Father's Day.

Q Right.

A Clarence Gokay, Sr.

Q Who was the assistant cook that day?

A I did not have an assistant cook that day, sir.

Q Do you recall being asked this question and giving this answer? This is again in your deposition, August 5, 1975, page 7, line 24:

"Q Who was the assistant cook?

"A I am not sure on that particular day."

So that back in August of 1975, you weren't sure whether you had an assistant cook that day, is that correct?

MR. BARTLETT: Objection, your Honor.

Would your Honor care to see the next question?

MR. NAPOLI: Your Honor, can I conduct my examination --

THE COURT: Let me see the next question.

(Pause.)

Q Let me read the question to you again --

THE COURT: Not that same question. You have just gotten through reading it. Once is enough, even in this trial.

Q At that time, in August of 1975, you weren't sure as to who the assistant cook was, isn't that correct?

A Well, I was not sure as to whether we had an assistant cook.

Q The question was: "Who was the assistant cook?"

"A I am not sure on that particular day."

So you weren't telling us you weren't sure whether there was or wasn't an assistant cook. Your answer to that question was, you weren't sure who was the assistant cook on that particular day.

THE COURT: Let me see the transcript.

(Pause.)

THE COURT: All right.

Q Isn't that what you were telling us in August, in August, 1975: that you didn't know who the assistant cook was?

A From the best of my recollection, what I inferred by my answer was that I was not sure who the assistant cook

was, if we had one on that particular day, simply because the operation in itself is so small that it doesn't always require an assistant cook. The only time I have an assistant cook is during the season, which is July and August. It is a resort area, and this is the nature of the operation, sir.

Q Listen to the question and answer again --

THE COURT: No, not again. You have read it at least once, and I am not sure you didn't read that as part of the deposition you read earlier. I think you did.

Q Do you recall being asked this question and giving this answer, page 8, line 2:

"Q Will you provide us with the name and address of that person?

"A Yes."

Do you recall being asked that question and giving that answer?

A Yes, sir, I think I do recall it, yes.

Q That was in August, 1975?

A Yes, sir.

Q Have you ever provided us with the name of that particular assistant cook?

A There was none, so how could I provide you with such information, sir, if there isn't any.

THE COURT: You did check and found that you didn't have an assistant chef as of that time?

THE WITNESS: Yes, sir.

Q Who was the pot washer on that date?

A To the best of my knowledge, Thomas Gokay was the pot washer on that particular day.

Q You have here -- do you recall being asked this question, page 8, line 10:

"Q Who, sir, was the pot washer on that date?

"A I am not absolutely certain, sir."

Do you recall being asked that question and giving that answer?

A Yes, sir.

Q When was the first time you determined that Thomas Gokay was the pot washer on that particular day?

A Well, after being asked the specific question, I had to search for an answer.

Q Where did you search?

A Where did I search? Myself, with regard to the events that happened that particular day?

Q In other words, you didn't go to any documents or any records of any kind?

A No, sir, I did not, no. Well, I could have looked through documents; but I, you know, the answer to

the question was not provided by going through some documents.

Q When did you first come to the realization after August of 1975 that Thomas was the pot washer on June 17, 1973? When was the first time you became aware that he was the pot washer?

A I guess a period thereafter, you know.

Q Was it a week after the deposition when you said you didn't recall?

A I cannot answer specifically when it flashed in my mind. I don't know. It was a process. You know, the whole thing evolved. It was not a spontaneous thing where it just popped up.

Q The deposition was held on August 5, 1975, is that correct?

A Yes, sir, if that's the date --

Q We are now sometime in May, 1976?

A Right.

Q When did this flash come to you after August 5, 1975, that Thomas Gokay was the pot washer?

MR. BARTLETT: Objection.

THE COURT: He said it didn't come as a flash.

Q It was an evolutionary process?

A I guess it evolved, if that is what you would

like to say.

Q When did you finally come to the realization? Was it in the fall of 1975? Was it in the spring of 1976? When did this revelation come to you that Tom was the pot washer?

A Sometime thereafter. You know, possibly within a week or so, I was aware because of the fact that I was asked to provide an answer to a question which was very, very vital; so naturally, I responded as I thought, you know, I should have to.

Q When was the first time, in answer to our request to give us this information as to who was the pot washer, you told us that he was the pot washer?

A Excuse me? Would you repeat that, please?

Q In August of 1975 you had promised to give us certain information, to supply the names to us of who the pot washer and assistant chef was, isn't that correct? Right?

A I imagine, sir, if that's what the question was; yes, sir.

Q When was the first time you finally came around --

THE COURT: He answered that.

MR. NAPOLI: No, telling us.

Q When was the first time you told us that Tom was

the pot washer?

A You never came to me since, sir, and asked me personally.

Q Did you ever send the information to your attorney?

A I guess the attorney must have realized that, yes. I am not sure.

Q Did you write a letter to your attorney and say "This was the pot washer. We didn't have an assistant chef that day"?

A I did not, no.

Q So the first time that you are telling us in terms of our inquiry of who was the assistant chef and who was the pot washer, our inquiry of August, 1975, is today, isn't that correct?

A The first time that I am telling you? Yes, sir.

Q When is the first time you told your attorneys that there was no assistant chef and that Tommy was the pot washer on June 17, 1973?

MR. BARTLETT: Excuse me. Mr. Napoli keeps pointing to me as the attorney --

MR. NAPOLI: Your Honor, I am not pointing to him as the attorney.

Q When was the first time you told any of your

attorneys that there was no assistant chef and that Tom was the pot washer, after August --

A Whenever I had a discussion with them since the pre-trial investigation or hearing, whatever it is called, sir.

Q When did you have that discussion with them? Prior to 1976?

A I had a discussion with Mr. Bartlett on the telephone, you know.

Q When was that?

A A number of weeks ago.

Q How many weeks ago?

A About two, I would say.

Q When you say "two weeks ago," would it be last week or the week before last week?

THE COURT: Last week wouldn't be two weeks ago.

A I am not sure exactly as to the, you know, the specifics or the dates. It is possible that I discussed it with Mr. Dubrowski since, also, you know. I don't really recall the specifics, and I can't give you an exact answer. Evidently, that's what you are looking for, but I can't pinpoint it to the exact moment that it happened.

Q You say you spoke about this with Mr. Dubrowski, isn't that correct?

A I said it's possible that I discussed it with him, yes.

Q Are you sure that you spoke with him?

A I would imagine that I have, if I have had a discussion with him since, yes.

Q So you told Mr. Dubrowski at some time that there was no assistant chef and the pot washer was Tom, isn't that correct?

A I would imagine that I did, yes.

Q Did you tell that to him at any time in 1975?

A I don't recall, sir; I really don't.

Q Did you tell it to him at any time in 1976?

A I would imagine, there is a possibility that I did, yes.

Q Did you tell it to him in January or February or March of this year?

A I don't recall. I don't recall.

Q When you told Mr. Bartlett this, when did you tell Mr. Bartlett this?

THE COURT: What did he tell him?

MR. NAPOLI: When, your Honor.

THE COURT: He said, "A couple of weeks ago." He doesn't remember the exact date.

THE WITNESS: I don't remember the exact date.

Q You say, "A couple of weeks ago." Was it less than a couple of weeks or approximately a couple of weeks or more --

A Approximately. Approximately. I can't say exactly, sir. I am trying to co-operate. To the best of my knowledge, I would say it was a couple of weeks ago. This is the best that I can do.

Q Do you know when Mr. Bartlett stepped into this case?

A Yes.

Q Was it a couple of weeks ago that he stepped into this case?

A I would say it was a few weeks ago that he stepped into the case, yes.

Q When he stepped into the case two weeks ago, that's the first time you spoke to him?

A When he stepped into the case?

Q Two weeks ago is the first time you spoke to him?

MR. BARTLETT: Excuse me. I think he said, "approximately two weeks."

THE COURT: Sustained. You don't have to answer.

THE WITNESS: I don't know what to answer, really.

THE COURT: You don't have to answer anything. Don't volunteer. Just answer questions that the Court

permits you to answer.

Q Prior to June 17, 1973, how many times did you see Clarence Gokay, Jr., if any, or Chucky Gokay, at the restaurant?

A June 17, 1973; that's Father's Day?

Q Yes.

How many times did you see him prior to June 17th, Chucky, at the restaurant?

A I'd have to give you an approximation: About five, six times, four times, seven times. You know, I don't know the exact amount of times.

Q Did you ever tell anyone in August of 1973 that the assistant cook who was working on June 17, 1973 was no longer employed in the restaurant?

A Did I ever tell anyone --

Q In August of 1973; that the assistant cook who was there on June 17, 1973 was no longer employed in the restaurant?

A I don't recall saying that, no.

Q Do you recall being asked this question and giving this answer? Page 13, line 4 --

MR. BARTLETT: Excuse me. You don't mean August of 1973, do you?

MR. NAPOLI: August of '75.

Q Do you recall telling anyone in August, 1975 that the assistant cook who was employed at the restaurant on June 17, 1973 was no longer employed, in August of '75?

A It's possible that I said that, yes.

Q Do you recall being asked this question and giving this answer --

THE COURT: No, no.

MR. NAPOLI: He said, "it is possible."

THE COURT: Wait a minute. You have read that question and answer already, and he hasn't said anything inconsistent with anything in the question and answer you read.

Q You said, "It is possible." Did you say that in August of 1975, that that --

THE COURT: That's not a proper question. This is not a test of how much of his deposition he remembers.

Q Did you ever tell anyone that an assistant cook was employed at the restaurant on June 17, 1973?

A Do I remember ever telling anyone that an assistant cook was employed on June 17, 1973?

Q Right.

A I don't remember -- no, I don't recall.

Q Page 13. Do you recall being asked this question and giving this answer? Page 13, line 10 --

MR. BARTLETT: Objection, your Honor. It is the same question he read before.

MR. NAPOLI: It is not. It is inconsistent, your Honor.

THE COURT: You chose the procedure. You began by reading his deposition before you called him as a witness. Now you can't use it now unless he has said something that's inconsistent with something in the deposition.

MR. NAPOLI: It is inconsistent, your Honor.

THE COURT: Let me see the transcript again. You have already read it once.

(Pause.)

Q Were there times, Mr. DiMarcantonio, when Mr. Gokay's children would be in the kitchen prior to June 17, 1973?

A Yes.

Q What would they be doing in the kitchen?

MR. BARTLETT: Objection, your Honor, unless he specifies which one.

Q Any of the children.

MR. BARTLETT: Objection to the form, your Honor.

THE COURT: Why don't you break it down.

Q What children of Mr. Gokay did you see in or around the kitchen prior to June 17, 1973?

A Scott Gokay and Bryan Gokay, and they were working in the restaurant, in the kitchen.

Q Anyone else?

A Prior to -- give me the date again, sir?

Q I asked you: Prior to June 17, 1973, what children of Clarence Gokay did you see in and around the kitchen? You said, "Scott and Bryan Gokay." Isn't that correct?

A Yes.

Q Now I am asking you, isn't it a fact that Tommy Gokay was also in the kitchen prior to June 17, 1973?

A It's possible that he was, sir.

Q Isn't it a fact that Clarence Gokay and Chucky Gokay was in and around the kitchen prior to June 17, 1973?

A It's possible that he was in and around the kitchen, sir.

Q Did there come a time on June 17, 1973 when an accident occurred?

A Yes, sir, I believe it did; yes.

Q Did you witness the accident?

A No, I did not.

Q After the accident occurred, did you go to the scene of the accident?

A Yes, I did.

Q Where was the accident?

A In the kitchen of the restaurant.

Q Can you tell us what you saw --not what was said but what you saw in the kitchen of the restaurant?

A As I walked into the kitchen of the restaurant, young Chucky, and Mr. Clarence Gokay held his hand with what appeared to be a towel, or some white cloth, over it.

Q What hand? Do you recall what hand it was?

A I think it was the left hand.

Q Did you observe anything else about the hand?

A No, I did not.

Q Did you observe anything else about Chucky's appearance?

A He was standing there, you know. I don't know his appearance. What specifically? I don't what you are asking. He was standing there and his father was holding his hand. That's what I observed.

Q After that, what occurred, if anything, in terms of what you did or what they did?

A Somebody yelled, "Get him to the hospital," and I took the father and young Chucky into the car and we raced over to St. Francis' Hospital. We went to the emergency section.

Q When you went over to the hospital, you drove;

is that correct?

A Yes, I did.

Q In terms of Chucky and his father, what were they doing in the car?

A They sat in the back seat.

Q Can you tell us the condition of Chucky, if you recall, when he was in the back seat of the car, what you observed about his appearance?

A I was driving. He was in the back seat. What could I observe about his appearance, you know. I didn't know what had happened. I didn't know the seriousness or the nature of the accident. You know, we rushed to the hospital as quickly as we could get there.

Q At that time you weren't aware that his second, third, fourth and fifth fingers of his left hand had been --

A Absolutely not. I was not aware of it at that time.

Q When was the first time you were aware of that?

A When we got to the hospital.

Q How did you become aware of that?

A I guess Chuck -- Mr. Gokay must have told me.

Q Did you see the condition of the hand?

A No, no, I did not.

Q Did you stay at the hospital?

A I stayed for a time, yes.

Q How long did you stay at the hospital?

A Until Mr. Gokay was ready to leave, and I drove him to his home.

Q Did you go back to the restaurant that day?

A Yes, I did.

Q Did you look at the Hobart machine that day?

A Did I look at it? It was in vision. It was in the kitchen. How could you be in the kitchen and not look at it? Yes.

Q Did you clean the Hobart machine?

A No, I did not.

Q Did you clean it on Monday?

A Someone else took charge and cleaned the machine.

Q Who was the "someone else"?

A I think it was Tony Grassi or -- I don't know. I think it was Tony.

Q When did he clean the machine? Did you see him cleaning the machine?

A I did not see him clean the machine, no.

Q Do you know when he cleaned the machine?

A I believe it was the same day.

Q Had you, prior to this accident, paid any cash to Tommy Gokay for working in the kitchen?

A I believe I had.

Q Had you paid Bryan Gokay for working in the kitchen?

A Yes, I had.

Q Had you paid Scott Gokay for working in the kitchen?

A Yes, I had.

Q Prior to June 17, 1973, had Chucky Gokay done any kind of work in and around the restaurant?

A No. No.

Q Did he cut the lawn at all?

A I don't recall his cutting the lawn.

Q When you say you "don't recall," do you mean you don't know whether he cut the lawn or you don't remember whether he cut the lawn?

A To my knowledge, he did not cut the lawn. I don't remember his cutting the lawn; no, sir.

Q But you did see him in and around the restaurant, isn't that correct?

A Yes, sir.

Q Did you see him do any work in the kitchen prior to June 17, 1973?

A No, I didn't see him do any work. He wasn't there as an employee.

THE COURT: Did you ever see him cut the lawn at all?

THE WITNESS: No, no, I did not.

THE COURT: Who was cutting the lawn, so far as you know, prior to June 17, 1973?

THE WITNESS: Tommy usually or whoever, you know, was there. Many of the help in the restaurant volunteered to do a lot of the extra jobs. We were not that busy. We didn't have a heavy volume, so therefore there was a lot of spare time, and everybody kind of worked as a team and contributed and did whatever we had to, even to the point that there was times, you know, if I had to do the dishes, fine. Whatever had to be done, we did.

Q Do you recall having any conversations with Mrs. Gokay prior to June 17, 1973 -- yes or no -- with respect to Chucky working in the restaurant?

A With regard to Chucky's working in the restaurant, with Mrs. Gokay?

Q Yes.

A No, I don't recall. No.

Q When Bryan went to the restaurant, did he work as the assistant chef?

A He wasn't an assistant chef. I would say he was

a kitchen helper, preparation -- helped with the food preparation. I don't know where the assistant-chef title came.

Q You said that besides the chef, the kitchen got an assistant chef and a pot washer. You told us that before, is that correct?

A I don't remember saying "the assistant chef." I thought you said "assistant cook" or "assistant preparation man." If you want to call him "assistant chef," if that suits you, that's quite all right.

Q Is there any difference between an assistant chef and an assistant cook?

A Technically?

Q Yes, technically.

A I imagine there is.

Q Did you pick up this distinction while working in Marc Antonio's or while working in Long Island City?

A I would say, through all my experience.

Q What is the experience between an assistant chef and an assistant cook?

A I imagine an assistant chef goes through a great deal of preparation and has some academic, culinary training; the nutritional aspects has a great deal to do with it, as well as cake decorating, gardemargare, et cetera.

This is how I would -- he would also have to know pastries, and that type of thing. You know, my concept of a chef. However, the word "chef" is, you know --

Q Mr. Gokay was the chef?

A If you would like to say he was the chef, fine.

Q Did he have all these qualifications?

A I really don't know if he had all of these qualifications.

MR. NAPOLI: May we approach the side bar?

THE COURT: Yes.

(At the side bar.)

MR. NAPOLI: This can be off the record.

(Discussion off the record.)

(In open court.)

Q Mr. DiMarcantonio, did you bring with you the h ct machine that was involved in this accident?

A Yes, sir.

Q Did you bring the pan and the part that relates to the grinding part that was involved in this accident?

A Yes.

Q Was that the machine that was standing over here before?

A Yes, sir.

Q Those parts were the parts in the paper bag?

A Yes.

MR. NAPOLI: I offer them in evidence, your Honor.

MR. BARTLETT: Absolutely no objection, your Honor.

THE COURT: All right.

(Plaintiff's Exhibit 7 for identification received in evidence.)

Q Did you see these things assembled on the day of the accident?

A Did I see them assembled on the day of the accident?

Q The Hobart machine?

A You mean prior to the accident?

Q Yes, in the kitchen.

A I don't recall that I did, sir, no.

Q When was the last time prior to the accident that you saw the assembly of this machine?

THE COURT: What difference does that make?

A I don't remember, sir.

THE COURT: I can't see any relevance at all for that inquiry.

MR. NAPOLI: I withdraw the question. I am sorry.

THE COURT: There is no dispute that it was

assembled on the date of the accident.

Q Has that machine been in use since June 17, 1973?

A Yes.

Q Were you using it last week?

A Yes, sir.

Q You use the same pan and the same blades and the same machine, isn't that correct?

A Yes, sir.

Q You disassembled the machine to bring it here?

A Did I disassemble it to bring it here?

Q Yes.

A The machine was disassembled by the kitchen help, so that it was disassembled by someone other than myself, sir.

Q Could you reassemble it for us?

A I think I probably could.

Q Can you do that for us and show us what parts were where?

A Yes, sure.

THE COURT: That's going to take a while, if you are going to bring the whole machine out.

THE WITNESS: Yes, it is.

THE COURT: I think we probably should take our evening recess now and come back at ten o'clock in the

morning.

JUROR NO. 1: Your Honor, do you know how long this case will take?

THE COURT: We hope to finish this week. I assume that is in accordance with the estimate of counsel.

JUROR NO. 1: By Friday?

MR. BARTLETT: I certainly hope so.

JUROR NO. 1: I have to call my employer.

THE COURT: I hope we will finish this week. We will see you at ten o'clock in the morning. Have a good evening. Don't discuss the case in the meantime with anyone.

(Adjourned to May 20, 1976 at 10:00 a.m.)

CLARENCE O. GOKAY, JR., an infant, by his mother, DOROTHY GOKAY, etc.,

-against- 74 Civil 4577

MARC ANTHONY'S, INC., d/b/a MARC ANTONIO'S RESTAURANT

May 20, 1976

(In open court; jury present.)

A N T H O N Y D i M A R C A N T O N I O, resumed.

THE COURT: You are still under oath, Mr. DiMarcantonio.

THE WITNESS: Yes, sir.

DIRECT EXAMINATION CONTINUED

BY MR. NAPOLI:

Q Mr. DiMarcantonio, besides that machine, you were asked to bring the other parts of the machine, by Mr. Bartlett, is that correct?

A Yes, sir.

Q Are those things in this bag?

A Yes, sir. I imagine they should be.

Q Is this one of the parts of the machine?

A Yes, sir.

Q What part would this be? Would this be where the grinding element is?

A That's the grinding attachment, yes.

Q In addition to that, would this be the pan that was involved in the accident?

A Yes, sir.

Q Is this the condition that the pan was in at the time of the accident, or was it different?

A I would say that's pretty much the condition that it was in, sir.

Q Was it separating between the pan part and that nozzle part there like that?

A Possibly not.

Q Was it banged up the way it is banged up now in here, like that, dented, and everything?

A I would not imagine so. I guess time would take its toll on it.

Q So there is somewhat of a difference in terms of the condition of the pan?

A I guess you might say that, yes.

Q It was a lot smoother and newer at that time; less banged up?

A I'd say there were less dents in it, yes.

Q There wouldn't be e openings here that we can see through the light, here?

A There would not be.

Q Can you assemble this machine for us, please?

A Yes.

(Pause.)

Q Is that where the pan would be positioned or would it be positioned another way?

A It would be positioned this way.

Q Do you know how to position the pan?

A This is the way we position the pan. I believe that it should be positioned like this.

Q In June of 1973 did Marc Antonio's Restaurant have a liquor license to serve liquor?

A Yes, we did, sir.

Q Where was that bar located in terms of the restaurant?

A It was located in the kitchen.

MR. NAPOLI: No further questions.

THE COURT: Any cross-examination?

MR. BARTLETT: I have no questions at this time.

THE COURT: Thank you, Mr. DiMarcantonio.

(Witness excused.)

MR. NAPOLI: Your Honor, I call as my next witness Mrs. Gokay.

D O R O T H Y F R A N C E S G O K A Y, called as a witness, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. NAPOLI:

Q Mrs. Gokay, in June of 1973, were you working?

A Yes, sir.

Q Will you tell us where you worked?

A Deer Park Farms, Cuddebackville, New York.

Q You are the mother of Chucky Gokay, is that correct?

A Yes, I am.

Q In March of 1973, was your husband working?

A Yes, sir.

Q Will you please tell the Court where he was working?

A Marc Antonio's Ristorante.

Q Do you recall when he started there?

A I believe it was in March of 1973.

Q What was his position there?

A Chef.

Q Had you ever worked at Marc Antonio's?

A Just, I believe, once, running the dishwasher.

Q Were you ever at Marc Antonio's during March, April, May, June, 1973?

A Yes, sir.

Q Do you say you helped your husband out once

while you were there?

A Yes, just peeling vegetables. Then I went home.

Q When you were there, were any of the children there working in the kitchen?

A Yes, sir.

Q Were they working?

A Yes, sir.

Q Were they paid?

A Yes, sir.

Q Can you tell me how they were paid?

A They were paid by cash.

Q When you say "they," who are you referring to?

A Thomas and Chucky.

Q How many times, to your knowledge, did this occur?

A Quite a few. I can't be exact.

Q Were you ever there while Chucky was working?

A Yes, sir.

Q Do you recall how many times?

A Just a few.

Q To your knowledge, was he paid?

A Yes, sir.

Q How was he paid?

A Cash.

Q Did you ever have any conversation with Marc-antonio with respect to objecting to Chucky working there?

A Yes, sir.

Q Who was present during that conversation or conversations?

A My husband, Thomas and Chucky.

Q Do you recall when this conversation took place, before the accident --

A Prior to this accident.

Q Can you tell us what was said at that time, if anything, by you and Mr. Marcantonio?

A Yes, sir. I said to Mr. Marcantonio, "One of these days, one of these children are going to get hurt," and he said nothing.

Q When was the first time that you became aware that the accident had occurred?

A When I came home from work, my husband was sitting at the kitchen table, and I asked him what was the matter, and he said, "Chucky had an accident."

Q That was on June 17, 1973, is that correct?

A Yes, sir.

Q When was the first time you saw Chucky after the accident?

A My husband said he was upstairs in the operating

room and I shouldn't go down until I was called, but I did go to the hospital, and I saw him later on that evening, and he was in shock.

Q Did you see his hand?

A It was all bandaged up.

Q Did you see Chucky in the hospital, while he was still in the hospital, every day?

A Yes, sir.

Q Can you tell me what his condition was, in addition to his hand, if anything?

A He just didn't say anything. We had no conversation.

Q Did there come a time when he came home?

A To this day, he has never really told me what happened, only except that he had an accident.

Q My question is: Did there come a time after the first hospitalization at St. Francis' that he went home?

A Yes, sir.

Q Did something happen with respect to the hand after he came home, that he had to go back to the hospital?

A He had an infection in it.

Q How long was he in the hospital the second time?

A Just a few days; not long.

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Q What did they do for him in the hospital the second time, if you know?

A They had to have him soak his hand in a solution and keep it wet constantly.

Q After the second hospitalization, did he ever go back to the hospital again?

A To Dr. Hsu's office, I believe.

Q He visited Dr. Hsu?

A Yes.

Q Dr. Hsu was here the first day of trial?

A Yes, sir.

Q Can you tell me, if you can recall, in terms of t' ngs Chucky did prior to the accident, that he d... t do after the accident; or his attitude after the accident as opposed to before the accident?

A His attitude changed tremendously. He wasn't the same boy at all. He used to do a lot of things for me, and he got very rebellious. He gave up -- he couldn't do baseball or any of the stuff that he did prior to that. He was in Little League, and he played football. And he just lost interest in everything.

MR. NAPOLI: No further questions.

CROSS-EXAMINATION

BY MR. BARTLETT:

Q Mrs. Gokay, you have given sworn testimony in this case prior to being on the stand today, haven't you?

A Yes, sir.

Q This was at a time when you were represented by Mr. Napoli's office, specifically a gentleman named "Mr. Weiss," is that correct?

A Yes.

Q Is it fair to say from what you tell us today, you are here to just give us your best recollection concerning all the events and just to bring out everything and hold nothing back, is that correct?

A Yes.

Q When were you married, ma'am?

MR. NAPOLI: I object to the relevancy of when she was married, your Honor.

MR. BARTLETT: Subject to connection, your Honor.

THE COURT: All right.

A Pardon me?

Q When were you married?

A 1950, September 23rd.

Q Your husband retired from the Navy in 1963?

A I believe so.

Q Were you present when he retired from the Navy?

A Yes.

Q Were you ever asked a question under oath, as to whether your husband ever retired from the Navy?

MR. NAPOLI: Your Honor, I object to the relevancy of whether Mr. Gokay retired, the materiality of whether he retired from the Navy, your Honor. I object to that, your Honor.

MR. BARTLETT: The question is asked on the grounds of credibility, your Honor.

MR. NAPOLI: This is far afield.

THE COURT: Overruled.

Q Did you ever make a statement under oath -- withdrawn.

Were you ever asked a question under oath as to whether your husband ever retired from the Navy?

MR. NAPOLI: Objection as to the procedure, your Honor.

THE COURT: Yes, yes.

Q Mrs. Gokay, did your husband retire from the United States Navy?

A Yes, sir.

Q Mrs. Gokay, do you recall being asked to give testimony on this case on the 6th day of October, 1975?

A Yes, sir.

Q And do you recall at that time you were represented by one of Mr. Napoli's associates, a gentleman named "Mr. Weiss"?

A Yes, sir.

Q Do you recall that the testimony you gave at that time was given under oath?

A Yes, sir.

Q And subsequent to that time, after that time, was the testimony transcribed into booklet form and then sent to you for your signature, again, under oath?

A Yes, sir.

Q Were you asked the following question on the 6th of October, 1975 and did you give the following answer -- your Honor, if I may, page 10, line 3:

"Q Did your husband retire from any Service?

"MR. WEISS: From what?

"Q From any Service; from the Navy.

"A I don't recall."

Were you asked that question in October, 1975 and did you give that answer?

A Excuse me, sir. It says "the Navy" there, doesn't it?

Q Yes.

A That was my answer.

Q That was from any Service --

"Q From any Service; from the Navy."

THE COURT: There are two questions there, really: "From the Service," question mark; "From the Navy," question mark.

MR. NAPOLI: Can we approach the bench on this, the relevance and materiality as to whether Mr. Gokay retired from the Navy?

THE COURT: No. I understand the relevance of it.

Q Would you like me to read it again, ma'am?

A Yes.

Q "Q Did your husband retire from any Service?

"MR. WEISS: From what?

"Q From any Service; from the Navy.

"A I don't recall."

Were you asked those questions?

A Yes, sir.

Q Under oath; and did you give those answers?

A Yes, sir.

Q And after they were transcribed, did you again --

THE COURT: She already testified --

MR. NAPOLI: Your Honor, this has already been testified to. That's the question and answer, your Honor.

THE COURT: Once I sustain the objection, you don't have to state it.

MR. NAPOLI: I am sorry, your Honor, I apologize.

Q Did there come a time that after this was transcribed it was sent to you and Mr. Napoli sent you a letter and indicated that if there were any changes in the testimony, you could make them?

A Yes, sir.

Q And did you ever change that testimony?

A Just a couple of things, about the children's ages in there.

Q But you never changed the question and answer I read you here, did you?

A I don't think so, sir.

Q You indicated that you had a certain conversation with Mr. DiMarcantonio regarding your boys working. Which boys were you referring to?

A Thomas and Chucky.

Q Was that the time when you told us that you made the complaint about them working?

A They worked there several times before that. Mr. Marcantonio called up on the phone to speak to me about the children working, and I said it was up to them.

Q Did you ever object to Mr. DiMarcantonio --

A As far as the children working, yes.

Q Did you ever object to your husband, the chef, concerning the children working?

A Yes.

Q When you objected to your husband, concerning the children working, what if anything did he say to you?

A I don't remember.

Q But you remember what Mr. DiMarcantonio said, right?

A Yes.

MR. NAPOLI: Your Honor, I object. The answer before was: he didn't say anything. This is argumentative, too.

THE COURT: Read the last question and answer, please.

(Record read.)

THE COURT: It may stand.

Q Did there come a time after the accident, madam, when you inquired of your husband how the accident took place?

A Repeat the question, please?

Q Surely.

Did there come a time after the accident took place, that you asked your husband how the accident took

place?

A Yes.

Q At that time when you asked your husband how the accident took place, what did he tell you happened?

MR. NAPOLI: I object, your Honor. This is hearsay again, your Honor.

MR. BARTLETT: Your Honor, I respectfully submit that this question --

MR. NAPOLI: If we are going to have extensive arguments, I would like to have it at the side bar.

(At the side bar.)

MR. NAPOLI: Mr. Gokay has already testified that he didn't see the accident. Even if he did tell her something, anything he is saying is going to be hearsay; and, too, if he got it from someone else, it will be double hearsay. He is not a party to this action and he can't make admissions on behalf of the infant plaintiff.

THE COURT: It would depend on the circumstances under which the remark was said. I suppose since he didn't see his wife for a number of hours after the accident, it wouldn't come in as an excited utterance.

MR. NAPOLI: It is not part of the res gestae. He was there in the hospital all day and then got home at night. It is clearly hearsay.

MR. BARTLETT: Mr. Napoli asked that same line of inquiry on his direct examination this morning of this witness, and he asked, "Did your husband say anything about the accident?"

MR. NAPOLI: I don't remember even asking that.

MR. BARTLETT: This man has it on the record. If you wish to take a five-minute recess, he can find it.

MR. NAPOLI: I didn't open the door to this at all.

THE COURT: I have a vague recollection that you did ask a question along those lines.

MR. NAPOLI: What I asked was, "When was the first time" -- my question was, "When was the first time you became aware of the accident?" She said, "When my husband came home."

THE COURT: Didn't you also say something about, that he hadn't seen the accident? How did that come up? Do you recall? We can have the reporter look for it.

MR. NAPOLI: I don't think I asked her that.

(Record read.)

THE COURT: I sustain the objection.

MR. BARTLETT: Your Honor, can I have a yes or no to the question, without asking for the testimony.

(Record read.)

MR. NAPOLI: You sustained the objection to the last question. The question he wants to ask has already been asked.

MR. BARTLETT: It is also based on the fact that on direct examination she said one thing, that is under oath in this court, which she did, concerning what her husband said; and it is contradicted by her statement under oath on another occasion.

THE COURT: No. I just had the reporter check that. There is nothing in her direct in which she reports what her husband told her about the accident.

MR. NAPOLI: Your Honor is sustaining the objection.

THE COURT: Yes.

(In open court.)

BY MR. BARTLETT:

Q Mrs. Gokay, after your son had the accident, at any time, even up until today, were you interested or concerned as to how the accident took place?

A Yes.

Q Did you make any attempt to find out how the accident took place?

A I just asked my son Chucky.

Q Did you ever ask your son Tom?

A I don't remember, sir.

Q Mrs. Gokay, when you say you "don't remember,' at any time when you were talking to your attorneys preparing for this trial, preparing for the examination before trial, talking to the family, at any time, you don't recall if you ever asked your son Tom?

A Yes, I believe I did.

Q Did Tom say anything to you about how the accident took place?

A Just said,"He lost his hand in the machine."

Q That's it?

A I don't know if he said he slipped. I don't remember right now.

Q You don't remember?

A No.

Q Did you ever ask anybody else how the accident took place?

A I didn't want to go near Marc Antonio's Ristorante after that.

Q My question to you is: Did you ever ask anyone else how the accident took place?

A Outside my family?

Q Anyone at all, ma'am.

A My husband?

Q That's it?

THE COURT: She did say she asked Chuck.

Q Chucky, Tom and your husband? You learned nothing from any of them, is that right?

MR. NAPOLI: Your Honor, I object. She already testified as to what was told to her, if anything, by those three people.

THE COURT: No, she hasn't.

MR. NAPOLI: He said she learned nothing. She already testified as to what Tommy --

THE COURT: No, she hasn't testified to that. If she has, I will let him go into it further. The point was that when the reporter checked his record, we found that she had not testified what she had been told.

MR. NAPOLI: I withdraw the objection.

MR. BARTLETT: May I have the last question read back to the lady, your Honor?

THE COURT: The objection has been made to it and sustained.

MR. BARTLETT: In that case, I have nothing further.

MR. NAPOLI: No questions, your Honor.

THE COURT: Thank you, ma'am.

(Witness excused.)

MR. NAPOLI: Your Honor, I call as my next witness Chucky Gokay, your Honor.

C L A R E N C E O. G O K A Y, J R., called as a witness, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. NAPOLI:

Q Chucky, may I have your date of birth?

A February 18, 1961.

Q In June of 1973, can you tell us what your age was then?

A Twelve.

Q In 1973 were you going to school?

A Yes.

Q Can you tell me what school you were going to at that time?

A Port Jervis Middle School.

Q What grade would that be, Chucky?

A Sixth.

Q At that time, were you involved in any sports, organized sports; anything like that?

A Yes.

Q Can you tell the Court and the jury what sports you were involved in?

A I was playing Pop Warner football.

Q What position did you play on the football team?

A I played the right end.

Q Did you play any other sports at that time?

A Yes, before the accident I played baseball.

Q Was that organized baseball, too?

A Yes.

Q What league did you play in at that time? Major league? Minor league?

A Minor league.

Q What position did you play at that time?

A Left field.

Q By the way, are you left-handed or right-handed?

A Right-handed.

Q So that the glove that you would be using to play with would be on your left hand, is that correct?

A Yes.

Q Did you play any other sports at that time?

A Basketball.

Q Was that an organized thing, or something after school?

A Something after school.

Q In addition to being involved in these other activities, did you have any job of any kind?

A Yes.

Q Can you tell us what kind of job you had?

A Worked for the Union Gazette paper, doing a paper route.

Q You delivered the newspaper, is that correct?

A Yes.

Q In addition to that, did you do any other things in terms of working? This is now prior to June 17, 1973 and this is separate and apart from Marc Antonio's. Can you tell the Court and jury what you did?

A I mowed the lawns for people, did other jobs around their houses.

Q Did there come a time in March of 1973 when your dad began working for Marc Antonio's Ristorante?

A Yes.

Q Do you know when that was?

A No, I don't.

Q Would it refresh your recollection if I told you it was sometime in March of 1973?

A Yes.

Q Could it have been March of '73?

A Yes.

Q Do you know where the restaurant was?

A Yes.

Q Can you tell us, please?

A In Milford, Pennsylvania.

Q Do you know who the owner of the restaurant was?

A Yes, Marcantonio.

Q Is that the gentleman sitting back here --

A Yes.

Q -- with the red hair?

Prior to June 17, 1973, had you been in Marc Antonio's Ristorante?

A Yes.

Q Can you tell us approximately how many times you were there?

A About five or six times.

Q Do you remember the first time you were in the restaurant?

A No.

Q Do you recall whether it was between March, 1973 and June of '73, the first time you were in the restaurant?

A Yes.

Q Prior to June 17, 1973 had you been in the kitchen of the restaurant before?

A Yes.

Q Was that the five or six times before June 17, 1973? Were you in the kitchen during those times?

A Yes.

Q Prior to June 17, 1973, when you went to the restaurant on these five or six times, had you worked in the restaurant?

A Yes.

Q Had you worked in the kitchen?

A Yes.

Q Had you worked at all with Marcantonio in the kitchen?

A Yes.

Q Can you please tell the Court and the jury prior to June 17, 1973 what you did, in terms of working only now at Marc Antonio's in the kitchen?

A He used to make some pastries, made cream puffs. I used to fill them for him when he was busy.

Q Separate and apart from working with Marcantonio, can you tell us, the five or six times prior to June 17, 1973, what you generally did around the kitchen?

A Washed pots, cleaned out the refrigerators, peeled vegetables.

Q When you did all these things, separate and apart from working with Marcantonio with the pastries, would he come into the kitchen and see you doing this kind of work?

A Yes.

Q This would be the five or six times you were there prior to the accident?

A Yes.

Q Prior to June 17, 1973, were you paid at all for the work that you were doing in the restaurant?

A Yes.

Q Can you tell us who paid you?

A Marcantonio.

Q Can you tell us how he paid you?

A By cash.

Q Was that the way Tommy was being paid?

A Yes.

Q You were here yesterday when Mr. Marcantonio testified that he paid Tommy by cash?

A Yes.

Q On June 17, 1973 when was the first time -- withdrawn.

Did you go to the restaurant on June 17, 1973, on Father's Day?

A Yes.

Q What time did you get there?

A Around a quarter after 11, 11:30.

Q How did you get in?

A We had to bang on the door to wake up Marcantonio

to let us in.

Q Did Marcantonio let you in?

A Yes.

Q You were standing there; you were looking at Marcantonio and he saw you?

A Yes.

Q Did you have any conversation with Marcantonio at that time?

A Yes.

Q Can you tell us what you said to him and what he said to you?

A I asked if I can mow the lawn.

Q What did he say to you?

A Yes.

Q Did you mow the lawn?

A Yes.

Q Did there come a time when you went into the kitchen?

A Yes.

Q Can you tell me, was this after you mowed the lawn?

A Yes.

Q Can you tell me approximately what time you went into the kitchen?

A No, sir.

Q When you were in the kitchen, can you tell us what you did while you were in the kitchen, Chuck?

A I asked my father if he needed anything done. He told me to clean out the refrigerator.

Q Prior to the accident, were you cleaning out the refrigerator?

A Yes.

Q You were in the process of cleaning out the refrigerator?

A Yes, sir.

Q Can you tell me, prior to the accident, whether you noticed what your brother Tommy and what your father were doing?

A Can you repeat that, please?

Q Prior to the accident, you are in, cleaning out the refrigerator, you are in the refrigerator, in and out of the refrigerator; were you able to notice what your brother and father were doing, if you recall?

A My father was cutting veal.

Q Do you recall what Tommy was doing?

A He was grinding tomatoes for a sauce.

Q Can you tell the Court and jury, as best you can, where you were prior to the accident, and in terms of

where you were walking; and as best you can recall, how the accident occurred?

A I went up to the bathroom first, and then I was walking down to get a soda.

Q Is this while you were still cleaning out the refrigerator?

A Yes.

Then I walked past the machine. I slipped. I tried to grab for the machine, and my hand went in, went in the hole in top of the machine.

Q If you recall, did you let out any sound or did you yell or anything like that?

A No, sir.

Q Were you able to get your hand out of the machine?

A Yes.

Q Did Tommy come over or what happened?

A While I was off balance, I pulled my hand out. Tommy turned around and seen me pull my hand out while I was off balance.

Q After that, what happened?

A He brought me over to my father.

Q Do you recall what your father did at that time?

A He grabbed my wrist. He squeezed it tight, so it

stopped bleeding. Then he told somebody to get a towel, or something, so he could wrap it around it.

Q Do you recall what happened after that? Where you went after that? Do you recall going into the car and going over to the hospital?

A No, I don't.

Q Do you recall being in the emergency room of the hospital?

A Yes.

Q Do you recall what they did to you in the emergency room at the hospital?

A No, sir.

Q Do you recall being operated upon in the hospital, going in for an operation for your hand?

A No.

Q After the operation or after the day of the accident, June 17, can you tell us how you felt on the 18th, 19th, you know, while you were in the hospital, in terms of your hand? Did you have any pain, or anything like that?

A Yes. They had to give me shots once in a while to calm down, so the pain is stopped.

Q I imagine you had pain the day of the accident and right after the incident?

A Yes.

Q Would it be fair to say that the pain was quite severe?

A Yes.

Q When you went home, do you recall what happened while you were home, before you went back to the hospital again in terms of your hand?

A Yes, my hand got infected, so I had to go back.

Q Was that a painful thing, too? Did that bother you?

A Yes.

Q Would it be fair to say that that was severe pain, too?

A Yes, sir.

Q When you went back into the hospital, did they do something for you while you were in the hospital again?

A Yes.

Q Did they operate? If you recall what they did.

A Yes.

Q Again, did you have any -- do you recall having problems of pain with your hand while you were there the second time?

A Yes.

Q After you went home from the hospital the second

time, I assume it was still bandaged up.

A Yes, sir.

Q Did you have problems of pain with the hand while you were home?

A Yes.

Q If you can recall, how long would that be in terms of months, weeks, days, or whatever, in terms of having pain, severe pain?

A I don't recall.

Q After the second operation, did you ever go back to play Pop Warner football?

A No.

Q Did you play end?

A No, sir.

Q Have you tried to play some baseball, put a baseball glove on your hand?

A Yes.

Q You tried?

A Yes.

Q Have you tried to play basketball with the hand?

A Yes, sir.

Q Do you have some problems playing baseball, holding a baseball bat?

A Yes, sir.

Q Or holding a glove on your left hand?

A Yes, sir.

Q In terms of playing basketball, do you have some problems holding the basketball?

A Yes.

Q Can you tell us a little bit in terms of doing things, cutting meat, something like that, do you have any problems with that, in trying to hold the knife?

A Yes.

THE COURT: I assume he holds the knife in his right hand.

Q Or fork, whatever it might be.

A Yes.

Q How about school? Are you going to school now?

A Yes, sir.

Q What school are you going to now?

A Port Jervis High School.

Q Once in a while do you have any problems with the other kids in school?

A Yes.

Q In terms of the hand? Do they make fun of you a little bit?

A Yes.

MR. NAPOLI: No further questions, your Honor.

CROSS-EXAMINATION

BY MR. BARTLETT:

Q Chuck, how tall are you now?

A I don't know.

Q How tall were you in June of 1973?

A I don't remember.

Q Have you grown since June, 1973?

A Yes.

Q Would you say you have shot up pretty well?

A Yes.

MR. NAPOLI: Objection, your Honor. "Shot up pretty well" is nebulous.

THE COURT: I guess it is obviously only introductory.

Q I think you answered. What did you say? Yes?

A Yes.

Q Let me direct your attention just for a moment, if I can, Chuck, to June 17, 1973. I think you told us that when you came there with your brother and your father, from what you tell us, you asked Mr. DiMarcantonio if you can mow the grass, is that correct?

A Yes.

Q And you did mow the grass?

A Yes, sir.

Q Did you do it all?

A Yes, sir.

Q The grass that you mow is approximately how long? How many feet is that portion that you mow?

MR. NAPOLI: Your Honor, I object to the relevancy of the square footage of the grass.

THE COURT: I think it might be more appropriate: How long did it take you to mow the lawn?

THE WITNESS: I don't know.

THE COURT: About an hour?

THE WITNESS: I think it was less than that.

THE COURT: Can you make an approximation?

THE WITNESS: No, sir.

MR. BARTLETT: Your Honor, if I may, that's the very reason I asked him how large it was.

THE COURT: I knew that. That is why I thought we might cut out the dimensions and get to the time, which is the critical point.

MR. BARTLETT: On the issue of credibility, your Honor, that he finished the job, I would like the jury to find out --

MR. NAPOLI: I object to statements by counsel, your Honor.

THE COURT: The jury will disregard all this

conversation between the attorneys and the Court. These are on legal matters that you don't need to be bothered about.

You may inquire.

Q Chuck, the area that you mow is approximately how big, the job that you finished?

A I don't know how long it is.

Q I am sorry, sir?

A I don't know how long it is.

Q No idea at all?

A No.

Q I think you told us that there came a time that you went into the restaurant and you said your father asked you to clean out the refrigerator? Did you just tell us that this morning?

A Yes.

Q Chuck, do you recall on October 6, 1975 being examined before trial, you were asked questions under oath concerning the facts of that day? Do you recall that?

A Yes.

Q Do you recall that on that particular occasion one of Mr. Napoli's associates, a gentleman named "Richard Weiss" was present and represented you? Is that correct?

A Yes.

Q Do you recall speaking to Mr. Weiss before you gave your sworn testimony?

A Yes.

Q Do you recall being asked the following question under oath and did you give the following answer?-- your Honor, if I may, page 29, line 4 -- Chuck were you asked this question and did you give this answer:

"Q Did your father ask you to straighten out the refrigerator?

"A No."

Do you recall being asked those questions under oath and giving those answers?

A Yes.

Q Again, after the examination was over, was it transcribed into booklet form like this and sent to you?

A Yes.

Q After it was sent to you, did you then go before a notary public and swear that the answers in there were true?

A Yes.

Q When you gave that answer, Chuck, on the 6th of October, 1975, was it true?

A Yes.

Q If I may just for a moment ask you a question or two concerning the happening of the accident. I think you told us that you had been going from the bathroom to get a soda, is that correct?

A Yes.

Q I show you Exhibit C, Defendant's Exhibit C in evidence. Take a look at it. Take your time.

Does Defendant's C in evidence, Chuck, show the aisle that you had to walk by going from the bathroom to wherever you were going to get the soda?

A Yes.

Q Does it show the position as to where the Hobart grinding machine was at the time?

A It looks like it was moved out a little.

Q Is it your testimony, Chuck, that it was moved, from where it was at the time of the accident, in that picture?

MR. NAPOLI: Objection.

THE COURT: Are you saying that the machine as shown in the photograph, is out a little from where it was on the day of the accident?

THE WITNESS: Yes.

Q So I take it, Chuck, the machine on the day of the accident was back further into the corner than from

where it is shown on that picture, is that right?

MR. NAPOLI: Objection, your Honor, "Into the corner." What corner is he now referring to?

THE COURT: Back further out of the aisle.

Q Is that correct, Chuck?

A Yes.

Q You say your brother Tom was doing some work with the machine, is that correct?

A Yes.

Q At this point your father was slicing the veal,-- just so we have the point in time -- correct, Chuck?

A Yes.

Q As you were walking from the bathroom to get a soda, this was the aisle you actually used, the one shown in Defendant's D, right?

A Yes.

Q This was your route, right?

A Yes.

Q As you were walking from the bathroom, did there come a time before any accident took place that you noticed your brother at the machine?

A Yes.

Q When you noticed your brother at the machine, did you notice what he was doing?

A Grinding tomatoes.

Q Did you see any of the tomatoes at that point going on the floor?

A Yes.

Q When you saw the tomatoes going on the floor -- incidentally, before the accident took place, for what length of time could you see that the tomatoes were going on the floor?

A It was a couple of minutes.

Q So it is fair to say, then, for a couple of minutes before the accident, you knew that tomatoes were going on the floor, right?

A Yes.

Q As you were walking by the machine--in other words, as you were walking from the bathroom down that aisle to get the soda, did you see, yourself, the tomatoes on the floor?

A I don't remember that.

Q On that same examination before trial that we spoke about, do you recall being asked the following question and giving the following answer?-- your Honor, if I may, page 54, line 15:

"Q As you were walking by the machine, did you see any tomatoes on the floor?

"A Yes.

"Q Did you see any of the ground tomatoes fall out of the pan onto the floor underneath the machine?

"A Yes."

Do you recall giving those answers under oath, Tom?-- being asked those questions under oath and giving those answers -- excuse me, Chuck?

A Yes.

Q When you gave those answers under oath, were they true at the time?

A Yes.

Q As you were walking from the bathroom to get the soda, when you saw the tomatoes spilled on the floor, as you now tell us, what if anything did you do?

A Will you repeat that, please?

Q Sure.

When you were walking from the bathroom down that aisle, as shown in Defendant's C, and you saw the tomatoes spilled on the floor, what if anything did you do?

A I don't understand the question.

Q Chuck, when you saw the tomatoes on the floor and you knew they were there for a minute or two, and you were walking, did you just walk into them?

A Yes.

THE COURT: I will do so.

MR. NAPOLI: And also to take judicial notice without specifying the applicable statutes of the state of Pennsylvania, your Honor, with respect to what I am alleging in this case.

THE COURT: That isn't necessary as part of plaintiff's case. Obviously, I will charge all the applicable statutes.

MR. BARTLETT: Your Honor, might I inquire, was the actual machine itself marked into evidence? I know the attachment was.

THE COURT: I believe the attachments only were marked because the bag was marked.

MR. BARTLETT: Do I take it that since it has been used, it is being introduced by Mr. Napoli?

MR. NAPOLI: The whole machine was introduced, your Honor.

MR. BARTLETT: No objection.

THE COURT: I hope we can stipulate that the defendant may retain custody of it. I am sure he needs it and I am sure the clerk would be dismayed if he had to store it.

MR. NAPOLI: No comment.

THE COURT: You will stipulate that the defendant

may retain custody of it?

MR. NAPOLI: Absolutely, your Honor.

Except for reading the statement of agreed facts to the jury, the plaintiff rests.

THE COURT: All right. Why don't you do that and then we will take our morning break.

MR. NAPOLI: Your Honor, does your Honor have a copy of this?

THE COURT: I believe I have, yes.

MR. NAPOLI: This is 1 through 9, your Honor.

(Mr. Napoli read to the jury from Court Exhibit 1.)

MR. NAPOLI: No. 4 was at the request of Mr. Dubrowski, your Honor. It is a stipulated fact.

THE COURT: It is a legal matter. I don't think you need read it as a statement of agreed fact.

MR. NAPOLI: I have no objection.

THE COURT: I might say that you have read the name of the corporate defendant and Marc Antonio's, Inc., and in the caption and in the paragraphs 1, 2 and 3 of the statement of agreed facts it is denominated "Marc Anthony's, Inc., d/b/a Marc Antonio's Restaurant."

MR. NAPOLI: I am sorry, your Honor.

(Mr. Napoli continued to read to the jury from

Court Exhibit 1.)

MR. NAPOLI: No. 6 again, your Honor, was at the request of Mr. Dubrowski.

THE COURT: You need not read it. There is no dispute about it.

MR. NAPOLI: If counsel has no objection, I could read No. 6.

THE COURT: Go ahead and read it.

MR. NAPOLI: No. 6.

MR. BARTLETT: Sure.

Your Honor, I see what Mr. Napoli is getting out.

THE COURT: Leave out the next-to-the-last word in paragraph 6.

MR. NAPOLI: He wanted that language. That's the reason I brought it to your Honor's attention. I will change it to "The defendant's premises."

THE COURT: All right.

(Mr. Napoli continued to read to the jury from Court Exhibit 1,)

MR. NAPOLI: Those are the stipulated facts, your Honor, and with that the plaintiff rests.

THE COURT: We will take our morning break now. Ten minutes.

(Recess.)

Q Why didn't you walk around them?

MR. NAPOLI: Objection, your Honor. Argumentative.

THE COURT: No. Overruled.

MR. NAPOLI: Your Honor, can we approach the bench on this, your Honor? I think it is important, otherwise I wouldn't ask.

THE COURT: I can't imagine anything you would say that would render this irrelevant or improper.

MR. NAPOLI: There is a lot I can say.

(At the side bar.)

MR. NAPOLI: It is irrelevant and immaterial because all it goes to is his possible contributory negligence, which isn't a defense in this case.

THE COURT: It is a defense unless it is established that he was an employee, isn't it?

MR. NAPOLI: On that theory, yes.

THE COURT: Well, on that theory, then, it is relevant. It only has to be relevant on one theory.

(In open court.)

(Record read.)

THE COURT: That is, walk around the tomatoes on the floor.

Q Do you understand that, Chuck?

A Yes.

Q Can you tell us why?

A No.

Q Was there room to walk around?

A Yes.

Q As you were walking from the bathroom down that aisle, as shown in Defendant's C in evidence, did there come a time, when you walked through the tomatoes, that you slipped?

A Yes.

Q When you slipped, did one of your feet slip, two of your feet slip, or just -- when you slipped, one, or two feet slipped, Chuck?

A I think it was both of them.

Q When both of your feet slipped on the tomatoes -- withdrawn.

They did slip on the tomatoes? That's what you are saying, isn't it?

A Yes.

Q When both of your feet slipped on the tomatoes, did they slip in front of you? Behind you? Which way did they slip? Any way at all?

A They slipped away from the machine.

Q So your feet slipped away from the machine. As your feet slipped away from the machine, what if anything

did you do with your arms?

A I tried to grab the machine with my left hand.

Q As both feet slipped away from the machine, was your body falling, when your feet were slipping from under you?

A Yes.

Q As your body was falling and your feet slipped from under you, you grabbed out for the nearest thing, is that it?

A Yes.

Q Is it your testimony that when your body was falling and you grabbed out for the nearest thing, that's when your hand came into contact with the worm gear, your left hand?

A Yes.

Q And that's when all four fingers came into contact with the worm gear, is that correct?

A Yes.

Q You are sure of that, aren't you, Chuck?

MR. NAPOLI: Objection, your Honor.

MR. BARTLETT: Withdrawn.

Q Are you sure of that, Chuck?

MR. NAPOLI: Objection, your Honor. He has already testified --

THE COURT: He may answer whether he is sure of it.

A Yes.

Q Chuck, at any time, were you over at the machine with your brother working with the machine, pushing tomatoes down into the hole?

A No.

Q Never?

A No.

MR. BARTLETT: Thanks very much.

Nothing further, your Honor.

MR. NAPOLI: No further questions, your Honor.

THE COURT: All right. Thank you, Chuck.

(Witness excused.)

MR. NAPOLI: Your Honor, at this time I'd like to mark as a Court's exhibit, if I may, the statement of agreed facts.

THE COURT: All right.

MR. NAPOLI: I do have a copy.

THE COURT: It will be Court Exhibit 1.

(Copy of statement of agreed facts, marked Court Exhibit 1.)

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MR. NAPOLI: I also ask the Court to take judicial notice of the life-expectancy tables, your Honor.

(In open court; jury not present.)

MR. BARTLETT: Your Honor, at this time, concerning motions at the close of plaintiff's case, I had indicated yesterday that I asked my associate to be allowed to argue. She is a member of the bar of the state of New York and not a member of the bar of this court.

THE COURT: First make your motion, before I decide whether or not I will permit argument. Normally, we don't have oral argument on motions to dismiss at the end of the plaintiff's case. There is a particular reason for not doing so in this case, in that you have already filed a memorandum of law and I have already read it and studied it; and, moreover, I have also studied the New York case which plaintiff's counsel called to my attention, and that case rules very similarly to the Pennsylvania case. So it seems to make very little difference whether or not Pennsylvania law or New York law applies.

MR. BARTLETT: Your Honor, one of the motions we are going to make at the close of the plaintiff's case, among other things, is subject-matter jurisdiction.

THE COURT: We are already past that point, aren't we? Haven't we decided that point already?

MR. BARTLETT: I respectfully submit that subject-matter jurisdiction can be raised at any time.

THE COURT: I know it can be, but once it has been raised and decided, there is no reason to raise it again.

MR. BARTLETT: Your Honor, I believe your Honor is referring to a motion that was made by my predecessor in interest concerning the attachment of an insurance policy. That is not the basis of the motion for subject-matter jurisdiction that we plan to make at this time. We will be brief, if your Honor would indulge us just for several minutes.

THE COURT: Do you mean to say, subject-matter jurisdiction?

MR. BARTLETT: Yes, sir.

THE COURT: All right. I will hear very briefly what the contention is.

MS. BILLAUER: Your Honor, I have prepared memos of law, one arguing the rest of the conflict problems in this case, and one supporting our motion to dismiss. The defendant's position, as far as the contributory negligence of this case goes --

MR. NAPOLI: Your Honor, I don't want to interrupt.

MS. BILLAUER: May I finish my statement?

MR. NAPOLI: I think it is unfair, what has

happened, with respect to submitting memos, I don't get a copy of it. I'd like to put this on the record because I think this is really sharp practice, your Honor.

THE COURT: If you will reach out your hand, she is trying to hand you one.

MR. NAPOLI: I want to put this on the record because I think it is unfair.

THE COURT: Don't put anything on the record until I hear her argument.

MR. NAPOLI: I just want to note that I got the memos today.

THE COURT: Your point has been made.

MS. BILLAUER: Your Honor, with respect to contributory negligence, it seems that the plaintiff's argument is that contributory negligence does not apply in this case, based on plaintiff's understanding of the child labor laws. It is the defendant's position that if indeed the plaintiff does not maintain its burden to prove that these laws apply, then contributory negligence, of course, will be an issue in the case, and at that time it is the defendant's position that New York contributory negligence applies.

With respect to the issue of child labor laws and workmen's compensation laws, if it applies to this

case, I think it has been conceded by both plaintiff and defendant that Pennsylvania law applies, and we have no objection and we are not changing our position at this point.

THE COURT: Wait a minute. Let's take this a little slower.

The defendant initially took the position that Pennsylvania law applied, and for that reason the case ought to be tried in Pennsylvania, for that reason among others, I should say. Then there came a time in which the defendant said that New York law applied. Now you are changing back again?

MS. BILLAUER: No. The defendant's position is that contributory negligence only applies, should there come such time that the Pennsylvania law with regard to the child labor laws and the workmen's compensation law is not found to be applicable to this case.

THE COURT: What I just got through saying is that it seems to make very little, if any, difference whether New York or Pennsylvania law applies because under that Riggi case, the New York statutes are very similar to those in Pennsylvania, both as respects the necessity of proving negligence and as to the availability of contributory negligence as a defense. In both New York and the

Pennsylvania laws if the jury finds that the 12-year-old plaintiff was employed by the defendant, then the defendant is liable without a necessity of proving negligence, and that the contributory negligence, if any, of the 12-year-old plaintiff is not available either as a complete defense or in reduction of the damages.

The only difference that I can see on a quick comparison of the New York and Pennsylvania statutes is that under the Pennsylvania statute the principle of liability that I just referred to applies if the 12-year-old plaintiff was an employee, and also applies if he was working on the premises; whereas under the New York statute, it would appear to apply only if the 12-year-old plaintiff was an employee.

MS. BILLAUER: I have no objection to your statement. My problem is, if the jury finds that for some reason this young man was not employed or permitted to work, and if the labor laws do not apply, then we have a question of contributory negligence, and that's the only issue that I raise. I think that question can be --

MR. NAPOLI: Can I be heard on that?

THE COURT: Let me hear Miss Billauer.

MR. NAPOLI: It might solve the problem if I make one statement.

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If your Honor is going to charge the Pennsylvania statute as it now stands in terms of negligence and absence of contributory negligence, then my theory which I submitted in this case in terms of the -- in addition to, separate and apart from the statute, in my requests to charge that I submitted a week ago, I would withdraw that theory and just go to the jury on the statute, your Honor, so that there will be no necessity with respect to contributory negligence.

THE COURT: He would agree that the Pennsylvania statute applies.

MR. NAPOLI: She just said that.

MS. BILLAUER: If I understand that the plaintiff is going to the jury solely on the question of the statute, then at this point in time I move that this Court has no subject-matter jurisdiction over this action; that the plaintiff's case must be dismissed for failure to state a claim upon which relief can be granted. The basis for this is, the child labor laws are incorporated by reference into the Pennsylvania workmen's compensation statute. The workmen's compensation statute provides that if a child is illegally employed in violation of any statute of the commonwealth of Pennsylvania, then the infant plaintiff has two alternatives. He may choose to sue in --

according to the Pennsylvania terminology, civil suit in trespass --

THE COURT: You are going to have to speak a little more distinctly. I have a very great difficulty -- you are running your words together. Maybe the reporter is getting them, but I am not.

MS. BILLAUER: I will slow down. I am sorry, your Honor.

If a child is illegally employed in violation of the child labor laws of Pennsylvania, then this is incorporated by reference into the workmen's compensation statutes of the state of Pennsylvania, which provide that if an infant is illegally employed under or in violation of any statute of the commonwealth, then the infant has two alternatives. He may sue a civil suit, or he may bring his claim under the Workmen's Compensation Act. However, he is only permitted to sue in civil suit if he rejects the provisions of the workmen's compensation statute. Both the statute and cases are clear on how this rejection must be done. It must be done in writing and it must be filed with the Court. It also must be done before the accident applies. In the case of a minor, the parents are permitted to reject.

THE COURT: It must be done before the accident?

MS. BILLAUER: Yes. There are some cases that allow ten days after the accident.

THE COURT: Now I will hear from you, Mr. Napoli.

MS. BILLAUER: This is not a case of affirmative defense. This is a case that the plaintiffs have a pre-requisite to allege in their complaint that these conditions have been met.

In our memorandum of law, in support of our motion to dismiss, we have cited to you two. Additionally, I have just found a Third Circuit case, 1971, which holds that the Pennsylvania statutes apply--although it is a diversity case--and which state, as the plaintiff has stated in this case, that where the child is illegally employed, the workmen's compensation statutes apply and there is a conclusive presumption that unless the plaintiffs prove that these requirements have been complied with, the suit may not be maintained.

Furthermore, the courts, in several cases, have dismissed, based on the complaint itself, and have not let the cases come to trial at all.

MR. NAPOLI: May I be heard on that, your Honor?

THE COURT: Let me understand it, first.

What are the two openings available to the minor employee?

MS. BILLAUER: He may bring a case under workmen's compensation, or if he has complied with the requirements of the rejection of the Compensation Act in writing or by filing, he may reject the Workmen's Compensation Act and bring a suit in civil court.

THE COURT: If he brings a suit in civil court on the second option, does he have available to him that presumption of negligence which arises from the Pennsylvania statute, the child labor law?

MS. BILLAUER: If the jury finds that the labor law has been violated, then, of course, workmen's compensation does not apply -- contributory negligence does not apply, if that is what the jury finds. If the jury finds that the child was there for some other reason, then, of course, contributory negligence would be a defense.

THE COURT: If the child has not filed before the accident an election to be treated not under the Workmen's Compensation Act, then he cannot proceed in a civil action against his employer?

MS. BILLAUER: Exactly.

THE COURT: I will hear from you now.

MR. NAPOLI: Your Honor, to begin with, the statement was made by the young lady, that workmen's compensation is not an affirmative defense to be pleaded and

proved. That's absolutely wrong. The state of New York, it is an affirmative defense that must be pleaded and proved. In fact, I have appellate division case, your Honor, Bingham against Battista, and all the cases cited therein and cited thereafter, that it has to be alleged, pleaded and proved as an affirmative defense. If you look at the answer, your Honor, which was verified a while ago, your Honor, you will see that there is no affirmative defense of contributory -- of workmen's compensation. In fact, throughout this litigation, the defendants have alleged that the young man was not an employee, not a workman in this particular instance. In addition, your Honor, they never made a claim as employers for this particular individual.

That case I show you is very important in terms of having to amend their complaint, which they have never done, which the federal rules provided cannot be done after the case is put on the calendar for trial, which the statute rules provide cannot be done after the plaintiff has been prejudiced.

They have been going along for three years saying he wasn't an employee, workmen's compensation doesn't apply. If you are going to make a claim for compensation, it is barred--I will give you the statute, your Honor-- it is

barred one year after the accident. So any claim to go back and get workmen's compensation, your Honor, is gone, it has been gone two years ago. So for the defendants now to come in after three years and say there is no workmen's compensation, there is no employment, and that there is a bar of any kind for workmen's compensation; to then come to this boy and say, "Now after we tried the case for a week,"--and we never submitted memos on this issue a week prior to the trial, as his Honor's own rules require, to not even move to amend the answer to allege workmen's compensation as an affirmative defense, to now say to this boy,--"you can't get workmen's compensation, young man, and you can't recover in tort, we have prejudiced you by waiting so long to raise this ephermal claim," now let me is out of court, your Honor, in terms of a violation of the child labor law.

THE COURT: I think the contentions of both parties are clear, and I will take the matter under advisement.

MS. BILLAUER: May I just bring one thing to your Honor's attention? It is my understanding that we work on a concept of notice pleading, and in the statement of facts, on the third page, it says, "If on the trial of this action, the plaintiffs attempt to present proof that

at the time of this occurrence wherein the infant plaintiff was injured while he was an employee of defendant restaurant, the defendant restaurant will seek leave to amend its answer to plead in the alternative the defense of workmen's compensation."

MR. NAPOLI: That was last Tuesday, your Hono .

MS. BILLAUER: I further submit to the Court that arguments based on sympathy, may have their place in cases based on discretionary measures, such as pendent jurisdiction, but in --

THE COURT: I haven't granted leave to amend the answer yet.

MS. BILLAUER: Even if the answer is not granted, the plaintiff bears the burden of setting out as a prerequisite to suit that compliance with the Workmen's Compensation Act with regard to rejection of the Workmen's Compensation Act is the first step.

If your Honor would like, I have copies of the two cases that are not mentioned in the memo which conclusively bear out our position.

THE COURT: In other words, your claim is that it is jurisdictional, the plaintiff must allege the basis of jurisdiction?

MS. BILLAUER: And that the suit in civil case

is barred by statute.

THE COURT: All right.

MR. NAPOLI: Your Honor, I just would like to indicate that on May 11, I wrote a letter to your Honor objecting to them moving to amend the answer to allege workmen's compensation as an affirmative defense. I don't know if your Honor has the original, but I can give you the copy that I have; and I cited the law at that time that I have submitted to your Honor, in terms of estoppel, in terms of prejudice, and in terms of the plaintiff's position at this late date, trying to now change their theory as to whether this boy is an employee or not.

THE COURT: I will take the matter under advisement.

MR. BARTLETT: Your Honor, may all memoranda be marked as a Court's exhibit, please?

THE COURT: What is that?

MR. BARTLETT: I would ask that all memoranda submitted by all counsel be marked as Court's exhibits.

THE COURT: They don't have to be.

MR. NAPOLI: I have a logistic's problem, your Honor. I was only submitted with their memoranda today. I submitted my requests to charge a week prior to trial, as provided by your Honor's rules, preparation of case for

trial. I am going to first ask that these memoranda not be considered, your Honor, since they have not been submitted in time, your Honor. They put a tremendous burden upon me. They first submit this conflict memorandum into the trial. I have to spend a couple of evenings opposing that. Now they submit the two or three other memoranda. At least, can I have until tomorrow morning to reply to these memoranda?

THE COURT: Assuming the case is still going on tomorrow morning, if it is before I charge the jury, you may.

Are we ready for the jury?

MR. BARTLETT: Yes, your Honor.

(In open court; jury present.)

MR. BARTLETT: At this time the defendant would ask to introduce into evidence the Port Jervis or the St. Francis' Hospital record from Port Jervis, New York, which has just been received pursuant to my subpoena.

(Defendant's Exhibit J marked for identification.)

MR. NAPOLI: I'd like to look at it.

(At the side bar.)

MR. NAPOLI: I have no objection to those portions of the record that relate to treatment and care,

but any statement that is hearsay in the discharge summary, I am going to object to. He tried to get it in the other day, and the doctor didn't know what the source of that information was, so it is definitely hearsay; so I have no objection to the record going in, except that portion that's hearsay. That's all.

THE COURT: I don't know what we will do about it.

MR. NAPOLI: Covering it up.

THE COURT: You will have to make a xerox with that covered up and substitute it.

MR. NAPOLI: I will take care of it.

MR. BARTLETT: I would now move on the grounds that it is a record kept in the regular course of business; the doctor has so testified to that. He has testified that he did receive a history and that the history played a part in his diagnosis and treatment, and that he spoke to Mr. Gokay at the hospital.

THE COURT: Number one, he said that insofar as the statement made in the discharge summary is concerned, he cannot remember the source of the information. He doesn't know whether he got it from Clarance Gokay, Sr., Clarence Gokay, Jr., a nurse, from Marcantonio or from whom he got it. It is, therefore, remote from the source

and also remote in point of time. It is four days later. Particularly when there is some discrepancy between it and the summary or the emergency room record. I don't believe I can admit it. Clearly, it is a record kept in the ordinary course of business or made in the ordinary course of business, but that's only one of the hearsay problems that has to be overcome; and that is, there has to be no hearsay in his -- that is, Dr. Hsu's, acquisition of the information. We don't know where he got it from.

MR. BARTLETT: In that case, I will withdraw the offer.

THE COURT: All right.

(In open court.)

MR. BARTLETT: At this time, your Honor, I don't believe the stomper has been introduced into evidence concerning this machine. I would like to move to have it introduced at this time.

MR. NAPOLI: No objection, your Honor.

(Defendant's Exhibit K for identification received in evidence.)

MR. NAPOLI: If that was the stomper that was there at the time of the accident.

MR. BARTLETT: Yes, that's it. Do you want to bring him back on the stand to say so?

MR. NAPOLI: He can just nod his head.

MR. DiMARCANTONIO: Yes, it is.

THE COURT: It is received.

MR. BARTLETT: The entire machine is in evidence?

THE COURT: The entire machine is in evidence.

MR. BARTLETT: At this time, among other things, considering the weight of the machine, I would ask that -- before I do that, your Honor, I would like to introduce into evidence a Lufkin tape measure which is in inches.

MR. NAPOLI: No objection, your Honor.

(Defendant's Exhibit L for identification received in evidence.)

MR. BARTLETT: Your Honor, at this time, since this can't be moved with any sort of ease at all, I would ask that the jury be allowed to view this particular machine as it now stands, specifically the attachments and the worm gear, as well as the depth of the worm gear into this hole.

MR. NAPOLI: Your Honor, except for the waste of time. We have the machine. We have photographs of the machine. I don't see any necessity of it.

THE COURT: If your objection is based upon the availability of photographs, it is overruled.

MR. NAPOLI: No. It is just that the machine is here. I withdraw my objection.

MR. BARTLETT: May the jury be instructed, if they wish, since this is like that, they may use this.

THE COURT: All right. The members of the jury may step down and look at the machine. You may use the tape measure, if you wish.

MR. NAPOLI: There is testimony that the pan is not in the same condition as at the time of the accident I'd like that to be indicated.

THE COURT: The differences that were pointed out don't affect the overall configuration of the pan.

MR. NAPOLI: I think they do, your Honor.

(Pause.)

THE COURT: I want to caution the jury not to say anything to one another as they examine the machine. You are each free to examine it to the full extent you want, but you shouldn't comment to one another. You can watch what anybody else does, unless counsel wants to put a witness on and have him explain the dimensions he is interested in.

MR. NAPOLI: I think that might be faster, your Honor.

THE COURT: That's up to Mr. Bartlett. It is his case.

MR. BARTLETT: Your Honor, I think it might be

even better firsthand for the jury to see it themselves and make any observations they wish as to depth, and so on.

(Pause.)

MR BARTLETT: Your Honor, I would just like to obtain from Mr. Napoli the stipulation as indicated in the interrogatories, that it is claimed on the date of the accident --

MR. NAPOLI: Your Honor, I am going to object to any statements by counsel. If he wants to make some kind of statement, I'd like it to be at the side bar. It might be innocuous, but I don't know, your Honor. I don't think the attorney should be testifying.

MR. BARTLETT: It is not necessary. If you just look at the last interrogatory, I won't mention to your Honor what it says.

THE COURT: Show it to me.

(Pause.)

THE COURT: Yes, you can read the interrogatory and the answer, if you want to. If you are willing to stipulate that these are the facts --

MR. NAPOLI: I will stipulate to that right away, your Honor. That's No. 59. I stipulate that at the time of the accident he was 12-years old. He weighed 89 pounds

and his height was 5-2 or 5-3, which would be 62, 63 inches.

THE COURT: All right.

MR. BARTLETT: Your Honor, with that the defendant rests.

MR. NAPOLI: I'd like to call one very short rebuttal witness, your Honor.

THE COURT: I want to see counsel at the side bar.

(At the side bar.)

THE COURT: I'd like an offer of proof to make sure this is proper rebuttal.

MR. NAPOLI: It is just on the condition of the pan at the time of the accident, which is --

THE COURT: It has already been covered. That gap wasn't there and some of the dents were not there.

MR. NAPOLI: It wasn't raised as it is raised now. I think that is important. The Gokays, ever since they have seen it, they have been telling me that it didn't have that much height, that it was flatter.

THE COURT: In other words, it didn't have that slightly recessed portion or contoured portion around the neck?

MR. NAPOLI: Right. It was flat, especially by the nozzle. The other thing is, when he operated it,

it wasn't set up the other way with the hole in the back. The hole was in the front.

THE COURT: That is simple.

Let me show you something.

(Discussion off the record.)

(In open court.)

THE COURT: The plaintiff has also rested.

We have come to that part of the case where all of the evidence is in and after our noon break, counsel will make their summations and I will give you my instructions or charge.

You may recess now for lunch and come back at two o'clock.

(Jury not present.)

MR. BARTLETT: Your Honor, at this time the defendant's renewal motion is made at the close of the plaintiff's case on the same argument and on the same grounds as in their arguments heretofore submitted. I additionally move for a directed verdict on the ground that the plaintiff has not established a prima facie cause of action and the plaintiff has proven himself to be contributorily negligent.

We also move on the same grounds that, therefore, the derivative action of the plaintiff's mother must fall.

THE COURT: To the extent I previously indicated, I will take the motions under advisement.

MR. BARTLETT: Two o'clock, your Honor?

THE COURT: I will try to be here a few minutes earlier so that I can tell you before you begin your summations what I am going to do on the legal points.

(Luncheon recess.)

AFTERNOON SESSION

2:00 p.m.

(In the robing room.)

THE COURT: These legal points are extremely complicated, and there is one aspect of the law which requires some further investigation, unless one or both of you can cite to me the appropriate statute.

The question is, does New York State have a statute comparable to the Pennsylvania statute that says that if an employee, such as the infant plaintiff here, does not disavow rights under the Workmen's Compensation Act, within a certain period of time -- for example, ten days after commencing his employment -- he is limited to the remedies available to him under the workmen's-compensation law in any action against his employer.

Do either of you know the answer to that question?

MR. BARTLETT: I don't know it off the top of my head, your Honor.

THE COURT: If there is such a statute in New York, it would seem to me that it would be immaterial whether the law of New York or Pennsylvania is applied, because they would be for all intents and purposes identical. My present disposition, quite frankly, is to permit the defendant to amend its answer to allege the workmen's-compensation defense for the reason that the plaintiff's

complaint in the state court and the plaintiff's complaint in this court merely charged general negligence and nowhere alleged that the plaintiff, Clarence Gokay, Jr., was an employee of the defendant. Thus, there was no reason for the defendant to raise a defense of workmen's compensation.

It was not until the question of transfer came up that the plaintiff raised for the first time the theory that the defendant was liable under the Pennsylvania child labor laws because he was an under-age employee, dispensing with the necessity of proving negligence and rendering the defense of contributory negligence unavailable.

For that reason, I think it would be unfair to deny to the defendant the right to amend its answer to assert that affirmative defense. There could have been no prejudice to the plaintiff because of a delay on the part of the defendant in raising that affirmative defense, raising a statute of limitations' bar against the assertion of workmen's-compensation claim because the theory of absolute liability on the part of the employer of an infant employee was not raised until after the one-year period of limitations had long since expired.

I have heard your arguments on that, and I don't need to hear any more, but I do want a short period of

time to check the New York State law, because, as I say, if the New York State law is the same as the Pennsylvania State law, in the respect that I mentioned, I won't even have to consider whether or not under some interest-analysis theory, New York State law ought to be applied here. If the New York State law does not contain that requirement of a disavowal of the workmen's-compensation coverage within a specified period of commencement of employment, then I will have to consider whether or not New York State law or Pennsylvania State law should apply.

MR. NAPOLI: I would like to say a few things to protect the record in terms of this issue.

Basically your Honor has before him a summons and complaint which was filed in the state court, and the state court summons and complaint and answer -- the answer in the state court is dated March 26, 1974; I will bring in a copy to be marked as a plaintiff's exhibit for purposes of this motion.

THE COURT: I think, to make the record complete, the complaint in the state court action also ought to be made a part of the record.

MR. NAPOLI: Summons, complaint and answer. In terms of the requirement that the plaintiff must plead, the plaintiff was an employee in his complaint in order to

get the benefit of the holding in the Battista case, which holds that an amendment cannot be made if the plaintiff is prejudiced, is not a necessary requirement. The defendant should know and should have known at the time of employment, at the time this boy was working there, that the plaintiff was or was not an employee. The facts at the trial showed that he was an employee. He, to his own detriment, took the position that he wasn't an employee, both as to workmen's compensation and as to the child labor law.

THE COURT: If I may interject for just a moment, the defendant has consistently taken and still takes the position that the infant plaintiff has never been an employee. There was no reason for him to plead the workmen's compensation defense until the plaintiffs asserted that the infant was an employee.

MR. NAPOLI: The assertion, your Honor--I don't have the exact date in terms of applying the workmen's-compensation law--again, I don't think that is a qualification. I am just saying that, your Honor.

In addition, the aspect of prejudice is definitely there. Basically that is it, your Honor, that the Battista case says that where there is prejudice, there cannot be an amendment; that this amendment does come three days into the trial, and my position is that there is prejudice

as per the Battista case, with no requirement that we allege employment in the complaint.

THE COURT: I don't see how you have been prejudiced by its coming into the trial, because I can't imagine that your proof would have been any different if the defendant had affirmatively pleaded the workmen's-compensation defense.

MR. NAPOLI: I think that some of the allegations and some of the proof might have been different, your Honor, especially in terms of whether an emphasis would have been put on New York law instead of Pennsylvania law. That is where I say the prejudice exists.

As I indicated before, my requests to charge were submitted two weeks ago and requested that Pennsylvania law apply with respect to the child labor law, without anything relating to workmen's compensation. I didn't get their brief or their cases in terms of now they are alleging workmen's compensation as a defense, exclusive remedy; because if it is an exclusive remedy, then this young man is out of court completely in terms of any law-suit. He is never able to go back and get workmen's compensation or proceeded--in that way I am prejudiced because maybe I would have emphasized some other aspects, your Honor.

THE COURT: I don't see how you have been prejudiced because the only thing you could have done if you had known from the outset that the defendant was going to plead a workmen's-compensation defense would be to take the tack that the boy was not an employee and go on a strict-negligence or general-negligence theory. That theory is still available to you. It hasn't been in the slightest diminished by anything that's happened up to now.

MR. NAPOLI: That isn't true, your Honor, because now there is a defense of workmen's compensation which defeats that theory. The defense of workmen's compensation then defeats that theory, too. If he is an employee, he is an employee. He can't go on the other theory any more. That is why I am saying this whole thing is prejudicial. If he was there as an employee -- if you allow him to amend as to workmen's compensation, putting in that defense now, I can't go on the other theory that he was there as an invitee, because you are saying, as a matter of law, that they have a defense that he was an employee. I have been saying all along that he is an employee. That was the proof.

THE COURT: You didn't say it in your complaint. You didn't say "employee" until well into this case, long

after the workmen's-compensation period of limitations had run.

MR. NAPOLI: The theory wasn't in terms of working there, working there that day. It was a thing where he wasn't there every day, five days a week, six days a week. The statute talks in terms of working. If you are going to permit him to amend now, although prior to the running of the year he could have put it in his answer, workmen's compensation is an exclusive remedy. He can't sue as an invitee. He is out of court completely. That is where the prejudice is in this whole situation. Waiting so long, three years -- with due respect to Mr. Dubrowski, in talking to these people about the case, they knew I was relying upon the statute all along.

THE COURT: Do you want a mistrial?

MR. NAPOLI: No, your Honor.

THE COURT: Do you want to start all over again?

MR. NAPOLI: I don't want a mistrial. I'd like to submit the case to the jury. I'd like to, on the basis of the Battista case -- there is definite prejudice, your Honor -- deny the motion on workmen's compensation.

THE COURT: No.

My question is, assuming I permit him to amend his answer, do you want a mistrial?

MR. NAPOLI: I think I have a better solution, your Honor.

(Recess.)

(In open court; jury not present.)

THE COURT: As I indicated to both of you informally a moment ago, we have checked the New York law and find that the New York law is precisely the opposite of the Pennsylvania law in the respect of requiring waiver of workmen's-compensation coverage at the time of employment or within a specified period thereafter.

The decision of the Court of Appeals of the State of New York in Warney versus Board of Education of School District No. 5 of the Town of Frondequoit, 290 New York 329, 1943, rules that it is against the public policy of the state of New York to permit an infant employee to waive his right of action under the general-negligence law. The New York State compensation law apparently differs from the Pennsylvania law in that a New York State employer in order to be able to plead the defense of workmen's compensation must establish that he posted on the premises a notice that all of his employees were covered under the workmen's compensation. Any employee who does not wish to be covered must give notice in writing that he will not be covered under the workmen's compensation law, and the

Court of Appeals has ruled that an infant employee, in that case a 12-year-old girl who was employed in the school cafeteria and who was paid only to the extent of getting free lunches, would not be covered under the workmen's-compensation law because it was against public policy to require that such an infant employee give notice that she did not wish to be covered.

Since there is, therefore, a very great difference, indeed a diametrical difference, between the New York law and Pennsylvania law, and since the plaintiff, as I understand it, has waived its cause of action under the general-negligence law and is confining itself to the cause of action under the child labor laws, the case turns upon whether or not New York law or Pennsylvania law applies. I believe that neither one of you would disagree with anything I have said up to now. The only question then is whether or not the New York law or the Pennsylvania law would apply. Would both of you agree that that is the pivotal issue in the case?

MR. NAPOLI: Yes, your Honor, but also, your Honor, I know we have discussed this. I still think that -- I'd just like an opportunity to submit an additional brief on it, the issue of prejudice and estoppel in terms of any amendment is still outstanding, and I would like to

submit a brief on that point.

THE COURT: Yes, I understand that, and I don't mean to have foreclosed that. I still do have to decide that the Court should exercise its discretion to permit the assertion of the workmen's-compensation defense, and, naturally, one of the things that will affect me in the exercise of my discretion is whether or not I find that New York State law applies. If I find that it does, then the amendment would be of no avail in any event. You have both requested the opportunity to be heard further on that, and Mr. Napoli has requested the opportunity to do a little further research on it and to submit authorities on whether New York State law applies.

We are already practically at the end of the day on Thursday, and I have a full schedule of pre-trial conferences tomorrow, as I have every Friday, so we weren't going to operate tomorrow in any event, except that if we had been able to get the summations and charge in today, of course the jury could have been sitting tomorrow, but the best we could do today would be to get the summations in. I don't think we would have time left for the charge.

Unless either of you has a serious objection, my suggestion is that we recess until Monday morning at ten o'clock, and I will give you until two o'clock tomorrow

afternoon to submit to my chambers any additional authorities or arguments that you want to submit and any arguments may be submitted either orally or in writing, because of the brief time, and my law clerks will lend a willing ear up to the point of tedium to any additional arguments you want to submit.

Does that meet with your approval?

MR. NAPOLI: Yes, your Honor.

MR. BARTLETT: Just so I understand, your Honor. I think it does meet with my approval. Your Honor is indicating that we have until two o'clock tomorrow afternoon to submit additional memoranda on any issue that is pertinent to this case, is that correct?

THE COURT: That's correct.

Then I will notify you Monday morning before you begin your summations what my decision will be on all of these legal points that are in question, and also the question about the Court's discretion in permitting the amendment; and you can then, after getting that information, proceed with your summations at that time.

Let's bring the jury out and give them the unhappy news.

(Jury present.)

THE COURT: I apologize to you for the length of

time we kept you waiting while we were going into some very troublesome legal questions with counsel. These questions, of course, don't concern you at all, but they are matters which the Court and counsel have got to be very careful about resolving. The questions are still not resolved, and I think that the only fair thing to do for all parties is to recess the case until Monday morning. I know that this is a disappointment to some of you who had hoped to be back at your jobs on Monday morning, but this is an important case, and I see no practical alternative to handling it in that way. We don't want to rush into a case of this importance without thorough consideration of all of the legal questions that have to be resolved. These questions didn't come in until the actual trial began, but they must be resolved before counsel can make their summation and before I can give you my charge as to the law.

Fully realizing that this is an inconvenience to some of you, I am going to have to ask your indulgence and recess the case until Monday morning at ten o'clock.

JUROR NO. 2: Judge, I have served under Judge Lasker for six days, and four days this. Could I be excused?

THE COURT: No, I am afraid I can't do that.

We should finish up very promptly. We will not be long next week. All of the evidence is in.

JUROR NO. 2: Will I have to serve the full week?

THE COURT: Oh, no, no. Anybody who has served --

JUROR NO. 2: I have, ten days.

THE COURT: If you have a full ten days in, as soon as this case is over, you are free from your jury duty. You won't have to serve the whole week.

JUROR NO. 1: In other words, we don't have to report tomorrow.

THE COURT: No. Tomorrow is all yours. You are free until ten o'clock Monday morning.

Don't discuss the case with anyone in the meantime and have a good weekend.

(Jury not present.)

(Adjourned to May 24, 1976 at 10 a.m.)

CLARENCE O. GOKAY, JR., an infant, by his mother, DOROTHY GOKAY, etc.,

-against- 74 Civil 4577

MARC ANTHONY'S, INC., d/b/a MARC ANTONIO'S RESTAURANT

May 24, 1976

(In the robing room.)

THE COURT: Before you begin your summations, I want to tell you briefly what our research over the weekend has disclosed with respect to the matters we discussed last week:

Number one, there is no significant difference between New York State workmen's compensation law and Pennsylvania workmen's compensation law. The question of election to be treated under the general laws of negligence instead of under the workmen's compensation law is no longer applicable because the New York State workmen's compensation law has been changed since the decision in Warne against Board of Education, 290 New York 329. Under the present law, even illegally employed minors are automatically covered under the New York State workmen's compensation law. Under the interest-analysis approach, which is mandated by the New York Court of Appeals' decisions, such as Tooker against Lopez, 301 NYS 2d 519,537 (1969), it appears that New York State has no interest in the application of its

laws in preference to those oe Pennsylvania.

I therefore will apply the law of Pennsylvania, the situs where the employment occurred and where the accident occurred. Under that law, if the infant plaintiff was an employee of Marc Antonio's Ristorante, his sole remedy is under the Pennsylvania workmen's compensation law, which provides for compensation at a rate of one-and-a-half times the normal compensation rate, with the excess to be paid out of the pocket of the employer and not being an insurable risk.

I therefore will submit to the jury the special issue whether Clarence Gokay, Jr. was an employee of Marc Antonio's Ristorante at the time of the accident and will instruct them that if they find that he was, that will be tantamount to a verdict for the defendant, and they need answer no further questions. If they answer that question negatively, then they will be directed to determine whether or not the defendant was guilty of negligence, and if they find that it was, whether or not the plaintiff was guilty of contributory negligence, and I will explain in my charge, how to determine the damages in the event of contributory negligence.

I do not believe there is sufficient evidence in the record to charge the question or charge the issue

of whether Clarence Gokay, Jr. was an independent contractor. The test whether a particular person or organization is an independent contractor is whether or not it is responsible for the results and has complete control over the methods and means employed to achieve such results. There is no evidence here whatever that Clarence Gokay, Jr. was an independent contractor while working in the kitchen, and I will not so charge.

I will file a written memorandum explaining in more detail my ruling on each of these points.

MR. NAPOLI: Is your Honor going to charge the Pennsylvania child labor law? As a child employee, wouldn't the Pennsylvania child labor law apply?

THE COURT: If he is not an employee, then the Pennsylvania child labor law doesn't apply.

MR. NAPOLI: If he is not an employee and he is hurt while working on the premises, then the child labor law applies.

THE COURT: No. The Pennsylvania child labor law applies only to employees.

MR. NAPOLI: No, it doesn't. It applies to children working on the premises, which in certain situations can be an independent contractor and can certainly be someone who is not an employee. You can't throw the child

labor law out. If the jury finds he is not an employee, then the child labor law comes into existence. One of the exceptions was independent contractors. It could also be a gratuitous employee, someone just working there.

THE COURT: Do you want to comment on that, Mr. Bartlett?

MR. BARTLETT: Yes, your Honor. I think two things would apply:

Firstly, as your Honor has already held, as the evidence in this case has indicated, there is no -- there has been no proof established to confront the issue of -- from Mr. Napoli's point of view, of independent contractor. Clearly there is no proof in the case that the infant plaintiff was an independent contractor.

Subsequent to that finding, your Honor, I would submit that the Child Labor Law of Pennsylvania cannot apply unless you find employment. That is the whole purpose of the law. I would submit that if he was not employed, then he would have to be in the restaurant itself, hired as an employee, and then he would have to be employed as an independent contractor, which the record has already indicated by its lack of evidence, cannot be the case.

MR. NAPOLI: If they find that he is not an employee but he was working there, the very definition of

the child labor law then takes application.

MR. BARTLETT: Apparently from what I understand, if he was permitted to work under the Pennsylvania statutes, I understand that the workmen's compensation law would still apply, the Pennsylvania workmen's compensation law.

THE COURT: The Workmen's Compensation Act of Pennsylvania defines "employee" as including "All natural persons who perform services for another for a valuable consideration, exclusive of persons whose employment is casual in character and not in the regular course of business of the employer."

On the other hand, the Child Labor Law of Pennsylvania reads: "No minor under 16 years of age shall be employed or permitted to work in, about or in connection with any establishment or in any occupation except," and it goes on to refer to --

MS. BILLAUER: Your Honor, if I may, I think it is Section 481 of the Pennsylvania Workmen's Comp. Act that says that that statute shall apply if there is any violation of any section of the commonwealth.

Therefore, a violation of the child labor law, including "permitted to work," would be incorporated into the workmen's compensation section.

MR. NAPOLI: Your Honor, I don't think they can

have it both ways. They are saying he is not an employee but he is covered by the workmen's compensation law. Because then if he is not an employee, then he has to be covered under the child labor law. It is like the independent-contractor situation. They have held under the Pennsylvania law, if he is an independent contractor, he is not covered by the workmen's compensation law. So her saying that, just doesn't follow from the cases we have been reading.

THE COURT: That argument makes no sense to me. Moreover, if we talk about talking both ways, both parties have talked both ways in this case from the word "Go."

MR. NAPOLI: Within the context of what we are talking about, your Honor, I am saying they cannot have it both ways.

MS. BILLAUER: In fact, the Pennsylvania cases make it perfectly clear that the Workmen's Compensation Act through the child labor laws apply to all minors illegally employed, and in fact they specifically --

THE COURT: It does indeed say that it applies to all employees including minors illegally employed. But there is the Act. You find where it says in there that it applies to someone who is working about an establishment but is not an employee.

MR. NAPOLI: If they find that he is not an employee, then they can consider the child labor law which says thus and so. They have to also find that he was working there, because that's an issue of fact. They claim he wasn't working there, but if they find he was working there and he wasn't an employee, then they can apply the child labor law.

There are people who are excluded from the workmen's compensation law, employees, independent contractors.

MS. BILLAUER: Not in Pennsylvania.

THE COURT: He is not an independent contractor. He may be a casual employee or casually working about a place of business. That's the only question.

Section 672 of the Pennsylvania workmen's compensation law Miss Billauer refers to, it reads in part:

"If the employee at the time of the accident is a minor, under the age of 18 years, employed or permitted to work in violation of any provision of the laws of this commonwealth relating to minors of such age, compensation either in the case of injury or death of such employee shall be," and so forth. It makes it clear that a minor illegally employed is covered and also a minor permitted to work in violation of the child labor laws is also covered at a

percentage or rate in excess of the normal rate of compensation.

MS. BILLAUER: Your Honor, it seems that if there is a violation of this child labor law, automatically it is covered by the workmen's comp. statute. If it is not a violation, then it is not a violation.

MR. NAPOLI: Has your Honor looked at the Rogers case? It is a Pennsylvania case. Right under the definitions of those sections.

THE COURT: I read it.

MR. NAPOLI: At least it raises a question of fact as to whether he is an independent contractor. It says, if so, the alleged employee is not carried on the defendant's payroll, he is usually given the status of an independent contractor. It is significant where there is no provision for the deduction of social security and other charges. Here I think there is at least a question of fact for the jury.

The testimony was, when he walked into the restaurant, he saw Marcantonio. Marcantonio said -- he asked Marcantonio, "Can I cut the lawn?" He said "Yes." He went and cut the lawn. He came back in, never saw Marcantonio. "What should I do next?" "Go clean out the refrigerator."

THE COURT: The key is the question, "What shall I do next?" That shows he wasn't there to do one particular job. He was there to do a series of jobs under the direction of his father and others.

MR. NAPOLI: I don't think it is so clear-cut that it is a matter of law that your Honor can hold he wasn't an independent contractor. There are enough facts, in terms of what was going on, for the jury to infer. He was off the books. They never kept records of his employment. They paid him in cash. Marcantonio -- there is no testimony -- as a matter of fact, Marcantonio alleges that he wasn't an employee. He testified that he wasn't an employee. Marcantonio has testified to that.

THE COURT: Don't talk about inconsistent contentions. You have been saying for the last two months that he was an employee.

MR. NAPOLI: I am giving you the facts, your Honor. I am not saying inconsistent things. I am just giving you the facts which would indicate that he could be, as a question of fact, an independent contractor. I am not trying to say that he is or isn't.

If Marcantonio was testifying that he isn't an employee, then he has to have some other status. If he is off the books, if they are not withholding social

security, if they are not withholding income tax, if the thing is casual, that's what your Honor was considering just now, the casualness -- I agree with what your Honor said, that it has to be both casual and the other thing to come without the definition. But it was casual. You have the casual aspect You have the aspect that Marcantonio says, "he is not an employee." You have the aspects of off the books. You have all these things that for a jury--and they dispute some of these aspects, they even dispute the fact that he is working there, just like your Honor is going to submit whether or not he is an empl ee to the jury, your Honor can give me a special finding on whether or not he was an independent contractor, because if he is, there is no dispute that the child labor law would then apply.

If they are going to get the benefit of letting them go for a special finding of employee, why can't I get the benefit of a special finding of independent contractor, especially when there are enough elements there to at least let it go to the jury.

MS. BILLAUER: Your Honor, if I recall the testimony, it seemed that when the boy came back, he asked his father, "What should I do next?" If that's the case, the Pennsylvania law seems to say, there is no different

changes between independent contractor and sub employee. Where one employee hires another employee, even if it is off the books, there is a conclusive presumption under that Section 481 that workmen's comp. applies.

MR. NAPOLI: Your Honor, if they want to charge that he is now a sub-employee, all I am asking for is what they are getting, a charge as to whether or not his status is as an employee. All I am asking is a special finding of whether or not his status is independent contractor. If I get that, I think all the issues will be before this jury, whether it was workmen's compensation law, whether or not he is an independent contractor, whether or not he is an employee, and whether the Pennsylvania labor law applies. You can get all these on the special findings and we can put an end to this litigation in terms of, I think, it would cover all the aspects of law in the special findings, especially on this independent contractor.

THE COURT: Have you got any proposed charges on independent contractor?

MR. NAPOLI: I have them handwritten, your Honor, yes. Can I bring it in?

THE COURT: I will look at it.

MS. BILLAUER: Your Honor, even if he was an independent contractor, he would be in that term permitted

to work.

MR. BARTLETT: I think more importantly, if I may submit, your Honor, the evidence in this case has not been established by the plaintiff to place before the Court the prerequisites for that charge, as your Honor has indicated in his decision, which was dictated into the record this morning.

THE COURT: I take it, if you get this charge, you won't want a charge on negligence?

MR. NAPOLI: That's correct, your Honor.

THE COURT: In other words, what you are requesting is that I submit two special questions to the jury:

One would be, whether or not Clarence Gokay, Jr. was an employee, in which case he is covered only under the workmen's compensation law; and,

Secondly, whether he is an independent contractor, in which case there is an absolute right of recovery.

MR. NAPOLI: I think another issue would have to be submitted in fairness: Whether or not he was working there. They do dispute that, unless they concede now that he was working there. If he was working there, that would have to be a qualification in terms of the child labor law. You have to show that he is working there.

If he is working there as an independent contractor,

then the child labor law can apply. If he was an employee, that's the end of it. If they found he was an employee, they would also have to find that he was working there.

(Discussion off the record.)

THE COURT: Is there anything in the record, Mr. Napoli, which would indicate that Clarence Gokay, Jr. was not subject to control of Marc Antonio's Ristorante with respect to the manner and means of doing his job?

MR. NAPOLI: Yes, your Honor. The casual nature in which he performed. For example, the testimony, to begin with, was that he started mowing the lawn. He would come in and be paid for mowing the lawn. The testimony with respect to that day was, he said, "Can I mow the lawn?" The answer was, "Yes." He went out and mowed the lawn. He wasn't instructed on how to do it. He finished the job. They didn't give him money, on the books, off the books. It kind of built up.

THE COURT: I can believe that with respect to mowing the lawn. The lawn-mowing job was over. Then he came into the kitchen and he said to the father, "Is there anything more I can do?" The father said, "Clean the refrigerator."

MR. NAPOLI: He says, "Go clean the refrigerator." His father didn't tell him how to clean the refrigerator,

what to do,"you have to stop working." He was cleaning the refrigerator. He would go to the bathroom, go for a soda. There was no control. His father who said he was overworked,was cooking. The fact -- one of the reasons the kid was there to begin with was the father couldn't control the kitchen. It was Father's Day. He was doing his own chores.

THE COURT: There was no agreed price for cleaning the refrigerator.

MR. NAPOLI: That was always worked out between Marcantonio and the boy at the end of the day. That was another aspect.

Your Honor, I understand what your Honor is getting at, and although you might say to yourself, "Maybe I don't think he is an independent contractor," but you can't as a judge sitting here say, "As a matter of law, he wasn't an independent contractor."

MR. BARTLETT: There has been no testimony that "anything would be worked out at the end of the day."

THE COURT: There are several authorities here that are relevant. Felten against Mellott, 67 Atlantic 2d, 727, it rules that"neither compensation authorities nor the courts should be solicitors to put claimants in the category of independent contractors when a reasonable view

of evidence warrants a finding that the injured person was an employee."

MR. NAPOLI: Can I interrupt, your Honor?

THE COURT: The case of Crookson against Knauff, 43 Atlantic 2nd, 402, rules that "Where the facts are not in dispute, the question whether a compensation claimant was an employee of defendant or an independent contractor was a question of law."

What facts are there in dispute here with respect to whether he was an employee or an independent contractor?

MT. NAPOLI: Let me be heard on both those cases you cite. The cases cited in those annotations, your Honor, relate to appeals from workmen's compensations boards. What they are trying to do is to make the law apply, and they have a public policy, which is the first case you read, a public policy to not exclude the employee from workmen's compensation. That's the reason for that case. It is a public-policy decision. It doesn't apply to this situation. You are talking about appeals from workmen's compensation boards, not from jury trials.

In answer to your Honor's question, I think I have delineated the facts. That's why I think the Rogers case is so important, because it is included in the supplement in those annotations. It held that although their policy

was to exclude -- to try as best they can -- in other words, you have to take those cases within the context of how they were being decided. They were being decided on appeals from the workmen's compensation board, where the claimant was trying to be held to the applicable workmen's compensation laws, and it was the public policy of the state that he be an employee if they can in any way, by any stretch of the imagination, be determined to be an employee. But those weren't appeals from jury trials.

If your Honor is submitting the issue of employment,"Is he an employee?," as a question of fact, I can't see how you can say as a matter of law he isn't an independent contractor. You can't do that, because you have the elements -- several of the favorable elements in the Rogers case. He wasn't on the payroll. There are no records of his working there, no social security. It has the aspect of control, but you can't say as a matter of law where the aspects of control fall. That's a question of fact for the jury.

THE COURT: The Rogers case, which is Rogers against P.G. Publishing Company, 166 Atlantic 2nd, 544, rules that "Neither the method of payment nor the fact that no provision was made for withholding social security or income taxes is determinative of the question: whether the

claimant was an employee or an independent contractor.

MR. NAPOLI: That's part of the decision, your Honor. It says, "The alleged employee is not carried on defendant's payroll. He is usually given the status of independent contractor." That is right in Rogers. Up here, "Thus, it is significant, where there was no provision for deduction of social security and other like charges," that is significant in terms of his being an independent contractor.

The annotations, your Honor, are misleading in terms of what the key language in the decision says, this language here, in terms of"no deduction for social security." That's what makes it a question of fact.

If you submit a special finding on independent contractor, then all the issues are before the jury and we can put an end to this litigation.

THE COURT: I think it is clear that the boy was operating under the direction of his father and was subject to the control of the father. If the father had told the boy how to clean the refrigerator, the boy would not have been permitted to disregard the father's instructions and to select the means and method of doing the work; and under the Rogers case, the test is whether or not the person doing the work has exclusive control of the manner

of performing it, being responsible only for the result. The court in that case said, "It is not the fact of actual interference or exercise of control by the employer, but the existence of the right or authority to interfere or control which renders one a servant rather than an independent contractor."

There is not the slightest question that the father had the right to interfere and tell the son how to clean the refrigerator. I am not going to charge the jury on the question of independent contractor on the authority of the very case you cite, "Rogers against P.G. Publishing Company."

MR. NAPOLI: How can you say as a matter of law the father had exclusive control? You can't say that, because the facts don't bear it out. As a matter of law, the father had exclusive control? The first conversation was, "Can I cut the lawn?" "Yes." The second conversation was, "What should I do next?" "Go clean out the refrigerator." There was no proof that the father had exclusive control over how the boy was going to do it, especially when you had these other elements: He was off the books, no social security --

THE COURT: I think you have the burden of proof. You have the burden of showing that the boy was an independent

contractor and you would have the burden of showing that he was free of the father's right to interfere with the method of performing the work.

MR. NAPOLI: I am saying there is enough to make it a question for the jury, not for the Court. How can you say "employee" is a question of fact for the jury but not "independent contractor" being a question of fact for the jury? They are both questions of fact for the jury.

THE COURT: There are disputed questions of fact as to the employment status. You adduced evidence from Mr. DiMarcantonio that he cannot remember ever paying the boy anything and he didn't remember seeing him do any work, including even mowing the lawn.

MR. NAPOLI: With respect to independent contractor, he denies he is an employee, Marcantonio. Again, there is another element that just cries for submitting the independent contractor aspect to the jury. How can Marcantonio deny he is an employee and have all these elements which point to independent contractor under the Rogers decision and not being conclusive as a matter of law that the father had exclusive control --

THE COURT: Because there is no issue of fact. You haven't put in any evidence at all that the boy was

an independent contractor. You haven't carried your burden of proof of showing that the workmen's compensation law does not apply.

MR. NAPOLI: If they find the boy is not an employee, you are not going to charge the child labor law either? You will charge the child labor law? If you are going to charge the child labor law, I will stop arguing and take my exceptions.

THE COURT: Do you disagree that I should charge the child labor statutes?

MS. BILLAUER: Yes, your Honor. One thing was bothering me about the statutory construction about if the employee is permitted to work. If the interpretation is correct that if the employee -- the term"permitted to work"is then superfluous --

THE COURT: Don't go back to 682. I have ruled against you on that and no amount of argument is going to convince me otherwise. You are ignoring the first three words of that section. What do you want to say about the child labor law?

MS. BILLAUER: That it is incorporated by reference in toto into the workmen's compensation law.

THE COURT: If that is all you have to say, your point is made. I will charge the child labor law, then.

MR. BARTLETT: Your Honor, do I take it that the answer of the defendant is deemed admitted to include the defense of workmen's compensation?

THE COURT: Yes.

MR. NAPOLI: At this time, your Honor, I take exception to that for all the reasons that have been expressed.

THE COURT: I don't know how you can really take exception to that. You have changed your position more often than a chameleon in this case. You began with a complaint that charged nothing but negligence. You changed on a weekly or even daily basis within the last month. Your theory is changing this morning, even, after having changed a couple of times over the weekend.

I don't have proposed charges from either of you on most of these things.

MR. NAPOLI: I submitted my proposed charges, your Honor, two weeks ago.

THE COURT: You didn't submit a proposed charge on independent contractor.

MR. NAPOLI: Your Honor isn't going to charge that. On the child labor law, I submitted it two weeks ago. I don't think there is any other proposed charge I need. As of this date, I would like to mark as an exhibit,

your Honor, a copy of a letter I received today, your Honor, with respect to this action, your Honor.

THE COURT: Excuse me?

MR. NAPOLI: It is a thing related to the lawsuit, but I'd like to reserve it right -- it is a letter I received this morning from Mr. Bartlett. After summations and charge, I'd like to mark it as an exhibit. I just want to reserve my rights as to that. I wanted to indicate that I got the letter this morning at about ten o'clock.

MR. BARTLETT: I have certainly no objection to his marking it afterwards, your Honor.

THE COURT: As the memorandum that I will file will indicate, I have concluded that under the Pennsylvania workmen's compensation law, the time to apply for compensation has not expired and therefore I see no prejudice in permitting the defendant to assert the defense of workmen's compensation at this stage.

MR. BARTLETT: Your Honor, just so my record is clear, I take it I have exception to the Court's charging the child labor law, is that correct? I didn't utter the word "exception."

THE COURT: Yes.

(In open court; jury present.)

THE COURT: I apologize to the jury for keeping you waiting so long. If you knew the legal problems that we had, you would appreciate perhaps what the Court and counsel are going through. Of course, you need not be concerned about these legal problems. You will have the job of deciding only the facts in the case, and it is my responsibility to tell you what the law is. The difficulty is in deciding what the law is. It is extremely complicated, more complicated than I could tell you, but I just want you to understand that we were not insensitive to the fact that you were being kept waiting and your time was being used. My apologies to you.

We have now come to that part of the case where the counsel will give you their final arguments or summations. As I told you at the outset, these final arguments are not evidence in the case. They are merely an indication by the attorneys as to what they think the evidence has or has not shown. You will be the ones who will decide whether the evidence has or has not shown what the attorneys claim it has or has not shown. So when you come to decide the facts of the case, you will base your decision upon your recollection of the evidence.

First the summation for the plaintiff, Mr. Napoli.

MR. NAPOLI: Isn't it in reverse, your Honor?

THE COURT: I am sorry. I am thinking of a criminal case. The defendant goes first. Mr. Bartlett.

MR. BARTLETT: Your Honor, Madam Forelady, ladies and gentlemen:

As you know by this time from what his Honor has just indicated to you, this morning each of the attorneys on behalf of each of their clients, will have an opportunity to discuss with you what we feel the facts in this case hold.

As you know, anything I tell you is not evidence. Anything Mr. Napoli tells you is not evidence. But what I would like to do this morning is to recall from my mind and discuss with you the brief trial that we have had and the various aspects of this case that you have seen introduced from the witness stand and, of course, the physical exhibits in order to help us all come to a conclusion as to what exactly took place on Father's Day, June 17, 1973.

There is one thing I think I should stress with you, and that is this: At any time during the course of my remarks with you this morning, if your recollection differs from mine, by all means, your recollection should control. In fact, it must control. But I do suggest for your consideration that if there is any substantial

difference at any time between what you recall and what I recall, because indeed there are six of you who will ultimately decide this case, you have the benefit of this gentleman, the court reporter, and anything you would like to have read back to refresh your recollection, of course, is available for you. With that in mind, let me just discuss the case really in two aspects.

There is no doubt that on June 17, 1973 an incident took place. Obviously, there is no doubt that in that incident Chuck Gokay, Jr. lost four fingers from his left hand. What I would like to do this morning is to discuss that aspect in two ways: Actually, what took place in that kitchen of that restaurant on June 17th; and, again, what was the boy doing there; because, actually, when you think about this, and I submit this for your consideration, what we are dealing with here is really a question of credibility.

In other words, it is a question of who do you believe. I think one thing is obvious, that as far as my client, Mr. DiMarcantonio is concerned, this is in very many respects what you might say a "blind incident." In other words, everyone admits he was not there. In fact, the only people who were in that kitchen on that day indeed were the plaintiff, his father and his brother; because,

going to get a soda. When he was walking, he was going to go past, so they tell us, the machine. One thing I think is abundantly clear, we have various pictures in evidence -- incidently, as you well know, all the exhibits in evidence you will be allowed to take into the jury room with you to peruse and consider as much as you feel it is appropriate. Everyone agreed on one thing, that the location of that machine as portrayed in the pictures is approximately correct. In other words, as we can see, it is over in the corner. I think perhaps various pictures will give you better views.

As we can see from the Defendant's Exhibit E, the machine that we are talking about is well over in the corner, and that's where it was on that day. I submit for your consideration that that becomes important for this reason. We are now told that as far as Chuck is concerned, he is walking from the bathroom and he is walking to get a soda. Everyone admits, and as you can see from E--it is marked, and it was marked by the plaintiffs--the specific route that would be taken. One thing is very clear. Look at the width of that aisle and look at the relationship, if you will, of where the machine is and where it was in regard to that aisle; because, you recall, if we are to accept the plaintiffs' story -- what do they tell us? They

tell us that as Chuck comes from the bathroom and he is walking to get a soda, he sees his brother using the machine; and they also tell us, and indeed he tells us, that when he sees his brother using the machine, he can see that his brother is spilling some of the tomatoes or some of the sauce onto the floor.

My recollection is this -- and you correct me in your own minds if I am wrong -- he tells us that he saw that tomato sauce or juice, whatever it was, the product of the tomato, being spilled for a minute or two. The point is this. He saw it on the floor; he knew it was on the floor; and he had this very wide aisle to walk on, according to his own testimony. He tells us what? -- if we are to believe him. He chooses, knowing it's on the floor, knowing he has an aisle this wide, to walk through the tomato sauce, and as he walks through the tomato sauce, apparently he slips; he tells us that both feet go out from under him to his right -- to his right.

In other words, he is falling away, because, keep in mind he is coming this way. He is falling away from the machine. You, of course, have seen the height of the machine, and more specifically, and I disassembled this part, you have seen what the grinding attachment and the top looks like. This, of course, will be readily available

for you in the jury room, along with, if you care to use it, a measure, in order to find out for yourselves exactly what is the depth all the way down here; because I submit to you that this incident could only have happened in one way, in one manner, and, frankly, that is not the manner in which the plaintiffs claim it happened.

Keep this in mind, if you will. The plaintiff, according to his own testimony, has placed himself in a position when he is walking by this machine--all five feet two inches of him--he slips, his feet go out to the right. Yet, he tells us that his hand, in grasping for the machine, is somewhat caught in the machine, but not only caught in the machine, it is caught when he -- he doesn't grasp here; he doesn't grasp any part of that machine itself; he asks us to accept that what he does: he grasps down like that.

I submit for your consideration that one thing is quite obvious, because you have seen the depth of the machine, of the grinder, and you will see where that worm gear is. If one is passing by that machine, if one slips, if one's leg goes out from under him and he grasps, what does he grasp with? Do you grasp like this, or do you grasp like that, with your fingers outstretched. Clearly, according to Chuck Gokay, he doesn't do this, which would

seem to be the most logical thing to do, because when he is falling--keep in mind, by his own admission, his body is slipping --how does he get his hand in a position where it goes like this?

In effect, and I submit this for your consideration, because, you know, this is what we talk about when we talk about the credibility, who you believe in this case? We all have a joint right here and it is called "a wrist." There is no joint here in the middle of the arm. There is only one way in which this could have taken place, I submit to you, and that is if someone was above the machine pushing down vertically. When you are slipping and falling, your hand can't go like that. You see the size of the machine and you see this. I can't put my hand into the machine because I am a little bigger than he is and my hand is a little bigger, but perhaps some of the ladies on the jury would have an opportunity, since their hands are far more petite than mine, to place it in here. I think you will find that the only way it can be done is from above, not in a grabbing manner.

What I submit to you is this: The manner in which the plaintiff tells us this incident took place obviously could not happen. Obviously, from the machine, from the facts, we can see it happening in some other manner.

Curiously, there are several things we can point to in this case that are going to show that indeed something else did go on in that kitchen, and it is a something else we are not being told about. Mr. DiMarcantonio wasn't there. He can't tell you. The only people who were there were members of the family, the only ones. Interestingly enough, what do they tell us? As far as the brother Tom is concerned, he says, "You know, at the time I had my back turned. I was doing something else with the machine and I saw nothing." He sees nothing. Then we say, "What was the father doing?" The father tells us that he was cutting veal and his back was to the whole incident and he knows nothing.

What has been established? One thing has been very clear. This particular table -- see this long bench with the two very large cutting boards that you see in Defendant's E? Your recollection will be that he told us there were lights directly above it. In other words, this is the table one would use when one was cutting meats. I think I even asked him, "Do you see the knives in these pictures that are laying here? Are they the knives you would use to cut the meat?" And he said "Yes, they would be." But what does he tell us?

On this particular day, for some reason, and I think we are going to understand the reason as we examine

together the evidence, he says he moves this very large cutting block -- take a look at that. Take a look at the size of that cutting block -- that for some reason on today's date he decides to move it. Where does he decide to move it on today's date? He decides to move it in a place where obviously it is not intended, over near the window, because he tells us he wants to look out the window.

Mr. Gokay says, "I moved the cutting board." Mr. Gokay says, "I wanted to look out the window." Mr. Gokay says, "I wasn't where I should be, facing the incident when it took place." I say, "Who is he kidding? Is he cutting veal or is he looking out the window?"

Use your own common sense, as I know you will. This is a situation where a chef who was cutting meat all of a sudden wants to be looking out the window? I think any chef with experience is going to attend to what he is doing, and one knows one does not slice meat while looking at the window, or anything else. What was the reason? What was the reason that on this particular day he was not looking exactly where he should have been, so his eyes could be right on there, right on that machine.

I will tell you what the reason was, because somehow, or some manner, Chuck was putting tomatoes into

that machine with his brother, and I will submit to you that's the only way it could have happened. Whether he was fascinated by the machine -- certainly it is something that would fascinate a 12-year-old; whether he wanted to help his brother Tom -- I don't know. I don't think we will ever know, because we haven't been told in this case. I do suggest to you this: That if the father was looking, we could have asked him some questions. He could have been cross-examined. We could find out exactly what had taken place. But, indeed, we don't know this. Curiously enough, both the members of that family know nothing about it. Their backs were turned.

I submit to you, why were their backs turned or, more accurately, why is it in the testimony of this case that indeed their backs were turned? The whole story, I submit to you, is not suggestive of credibility; it is not worthy of your belief. Can you accept for a moment that a boy who would get four fingers caught in a machine would not even yell out; there would be no sound; that all of a sudden a brother would appear behind the father's back and say, "Look, Dad, Chuck lost four fingers from his hand," when they are in the same kitchen? Because, you see, that's what they are asking you to believe, aren't they, because that's how they are telling you this incident took place.

Let me ask you this -- we heard the doctor on the stand. We do know that the boy lost the four fingers right across what would be the knuckles. Look at the depth of where his hand has to go in this machine -- let me ask you this: If by some magic, one was grasping for the machine and put a couple of fingers down, would they come off right there at the base line, if you were grabbing like that? Wouldn't you have to be putting those tomatoes down vertically? Wouldn't his hand have to go down exactly vertically for this incident to take place? You know, one thing is very clear to me. What we have here introduced into evidence is what they call the "tamper" or the "stomper." I think we all learned, and as we can see, what you do is you put the tomatoes down this way.

I will be frank to tell you, I don't know exactly what went on in that room. Indeed, how could I, since only the family was there. But I think we can use our own common sense.

Let me submit this for your consideration: Was Tommy using the stomper? Was Chuck standing by and all of a sudden he started to put some down, not realizing, or perhaps not being momentarily aware of that danger? Because there would be the vertical hand, wouldn't it? You don't get a vertical hand if you are falling.

Let me ask you this: According to the theory they now tell us, if you have all this space, if you have all this space, and you know there is tomato sauce there, why in the world do you walk into it? Why do you do that? Because he is not going out their door where the sign says "Exit," is he? We know he is going out over here. We know he is going out there. Why in the world do you fall in the tomato sauce, unless, perhaps, the presence of the tomato sauce, the slippery condition, created not by him, but allegedly by another employee, would be negligence, and not his own? Now I think we can see why the tomato sauce was there. But even then, they can't tell us rationally or reasonably, can they, knowing it is there, why he steps into it, when he has all that room to go around and when he is not going out that door; because now, I think, after all the evidence is in, we can see clearly exactly what took place with this machine.

Now, of course, we come to the subject of what was the boy doing there. The father says, "He is an employee of the restaurant." The brother says, "He is an employee of the restaurant." The boy says, "I am an employee." Mr. DiMarcantonio says, "Look, he isn't." But we are talking about a question, aren't we, of credibility, and we are talking about a question of the honesty

of the presentation.

You in this court are being asked to submit -- I submit this for your consideration--and please correct me in your own minds if I am wrong: Mr. Napoli stood before you last week and he said he would prove that the boy was employed; the father said the boy is employed; the brother said the boy is employed and the boy said the boy was employed. I invite your consideration to what you are going to hear now from Mr. Napoli about the question of employment, and I invite your consideration to the law that his Honor will give you as to whether the boy is employed or not. Let's find out here and now in part of this presentation, who is backtracking with you and who is not, because that's all part of this presentation. The presentation you see is the presentation in whole, in toto, that you are being asked to accept in this case.

I suggest to you they can't have it both ways. They can have it one way or they can have it the other way, but they can't have it both. Since this trial started they have been telling you the boy was an employee. Listen now to what they tell you and listen now, as I know you will, to the law and the instruction you receive from this Court, because one of two things are clear: Either he was an employee or he wasn't.

I suggest to you that their position now before you as to whether he was or not, will reflect and will cast as to what specifically has happened in this case and the type of presentation you are being given.

I tell you this: There is no way that this incident could have happened in the manner in which they claim that it took place, because we know one thing is for sure, the only way one can get one's hands into this grinder is from above, vertically, not in a grasping manner when one is falling, because of the fact the arm -- I don't care if you are 6-2, 5-2 or 4-2, the arm just isn't made with another joint in it. It doesn't work that way. It has to be from above. If his arm came in from above, he must have been doing something, either helping Tom, his brother, or standing there watching Tom, his brother, in a position where his arm could go in in that vertical manner.

I submit to you this, and I will be brief with you, because I think frankly it is the cardinal issue in this case. If the accident did not take place in the manner in which they claim it took place, then can we believe, can we accept, can we base a verdict upon what they are telling us in this case? One thing is crystal clear, and I say it is the cardinal issue: To grab, this

would be the first thing you grab, that pan. There is no way that someone's hand and fingers can get this many inches, whether it is five-and-a-half or six-and-a-half or six, down to that worm gear when one is falling away and grasping towards it. The smaller you are, the shorter you are, the more difficult it becomes, because we know you have to be over that machine. I am 6-2, and I couldn't do it. How did Chuck Gokay do it at 5-2.

I must submit to you, the answer is, indeed, he didn't.

That brings us to one final thing I submit for your consideration. Do you recall the emergency-room report that we finally got into evidence? We do know that the boy's father accompanied him to the hospital. Of course he did. That's not even in dispute. What does it say right here when they talk about how the accident took place? I caution you that this is a document that was made before a lawsuit was ever contemplated. It was a document that was made in the hospital at the moment the boy was brought in on June 17, 1973. "Father says child put left hand in meat grinder."

Let me ask you this: What does that mean? "Father says child put left hand in meat grinder." Is that what we are hearing now, that he put his left hand in

the meat grinder? I think we are hearing something else now. We are hearing now that he had an accident. We are hearing now that he slipped and fell. We are hearing now something other than the child put his hand in the meat grinder, because the only way you put your hand in this meat grinder is if you are doing that, not on a grasping motion.

So, in effect, I submit to you that the accident did not happen in the way the plaintiffs have claimed, and it did not happen that way not because Cliff Bartlett says it did not happen that way; it did not happen that way because it couldn't have, from the facts as we know them, from the physical facts of what this machine looks like, the depth in which he would have to place his hand, falling away and grasping.

I respectfully submit for your consideration that once we come to a determination, as indeed I feel the evidence compels us to come to, that the accident happened in some other manner, in some other way, than indeed what we have been told, then the question is why; and that "why," ladies and gentlemen, is what I talk about when I say credibility, believability, and what evidence and testimony in here is worthy of your belief.

One thing is clear. As far as this case is

concerned, I think we will all agree, everyone who sees a young boy who has lost fingers feels sympathy. I'd be rather distressed to find the type of person who couldn't feel sympathy, especially for a young boy with an injury like this. But we are not here talking sympathy. We are here because they have indicated that Mr. DiMarcantonio, through his negligence, has caused this injury.

I respectfully submit to you that from their own facts, and indeed in the case of the father and the brother, from what they haven't told us, we can tell that the accident took place in some other manner. As I said to you before, once it takes place in another manner, I say their credibility is very genuinely and very properly cast in doubt.

As I told you when I had the opportunity to discuss this thing with you folks here last week, we would prove certain things to you, and I told you by the use of the machine itself we would show you that this incident, this accident, indeed, could not have taken place the way the plaintiffs are claiming it has taken place. I indicated to you that this had to be done to your satisfaction.

Ladies and gentlemen, I respectfully submit for your consideration that the time has indeed come when what we have shown to you, what we have indicated to you, has

now been brought to life and clearly this incident could not -- could not -- have taken place in the manner in which the plaintiff claims. Based on that and based on the physical evidence as I show it to you here today, I respectfully urge and I respectfully ask that after considering the evidence, that you return a verdict on behalf of the defendant.

I thank you for your attention and I ask you to please give the same kind attention to Mr. Napoli that you have shown to me this morning.

Thank you, your Honor.

THE COURT: Mr. Napoli.

MR. NAPOLI: Madam Forelady, ladies and gentlemen of the jury:

In case I forget to later on, I'd like to take the opportunity now. I know this has been a trying two weeks for all of us. I'd like to thank the jury on behalf of myself and especially on behalf of Mr. and Mrs. Gokay and Chucky Gokay for your attention in this particular case, and specifically with respect to your attention while the Court and lawyers spend some time on some very important matters which to me is very surprising in terms of what you just heard and in terms of being very surprising with respect to, in terms that you just heard, how the

defendant and we have all been agonizing over during the last two or three days. What we have been agonizing over the last two or three days is a child, a 12-year old child working in a restaurant where there is this kind of a machine in operation.

What are we talking about? I am not here to tell you what the law is, but it is very important at the beginning of this whole thing, the beginning of hi. summation, what I am going to tell you about--which he very conveniently overlooked--at t.. beginning of my summation; and then when you get the opportunity to listen to the law in this case from the Ju ge, because that is so important with respect to a 12-year-old child.

We all read history books. We all know about child labor laws. The Judge will charge you about the law. We all know what the purpose is of child labor laws. The purpose is the very thing we are concerned about today. The purpose of child labor laws is to prevent the kind of injury that Chucky Gokay suffered, not because he was there, not because he made a mistake or he did what he did which was wrong, in terms of this particular apparatus. What we are talking about is only the fact that he was there, only the fact that he was working there, and that's the only thing that's important in this case.

The only thing that's important to this case is that you had a 12-year-old boy working in or about or near or in this machine. That's the only thing important in this case.

When you listen to the Judge's charge, see if it bears out what I am talking about. The only thing important to this case was the fact that he was working in or about that restaurant, working in or about the restaurant, working in or about the restaurant, working in or about the restaurant. That's the only thing important in this case, because -- and as I sat there and listened to Mr. Bartlett's version of the story, and there was no testimony with respect to his version of the story -- you know, Mr. Marcantonio never got on the stand, and where were all the other employees who were supposed to be there -- remember Mrs. Chivarou? The plaintiff put in its case and we rest. Do you think they had the opportunity? Sure they had the opportunity to put him on the stand, have him testify to what was said. He was in the car. He drove them over. He was in the hospital. He never said how this accident occurred.

Now Mr. Bartlett comes up with this tremendous story, the defendants come up with this tremendous story: that he put his hand in there. He was operating the

machine. It really doesn't matter. I will get to that later. Mrs. Chivarou, she was in the kitchen. Remember she came down? Where was she if the story wasn't the way it happened. It really doesn't matter. What am I talking about? First I told you about working. If he was working there, that' it. That's the ball game. You have to find in favor of Chucky. What am I talking about when I say it doesn't matter how the accident happened?

If the accident happened, my way -- not my way, the way Chucky testified, what he said happened, or it happened the way Mr. Bartlett said it happened; either way, what's the conclusion? He was working there. If it happened Mr. Bartlett's way, he was working there because he was pushing the tomatoes in. If it happened Chucky's way, if it happened Chucky's way, he was working there because he says he was cleaning out the refrigerator and during the course of cleaning out the refrigerator he decided to get a soda, so he was still working there.

That's what we are talking about in terms of child labor laws. If you have a minor, if you have a 12-year-old working in your establishment, that's it, that's the ball game.

Listen to the Judge's charge. Listen to the law. So when I sit there and I listen and he is telling

me, "Mr. Napoli, I agree with you. He was working there, but he wasn't working the way you said he was working. Chucky says he was in the refrigerator cleaning out the refrigerator. I say he was cleaning out the machine." It doesn't matter whether it was his way of happening or Chucky's way of happening. So I am not going to argue, and I can very easily go down point by point by point by point, as to why Chucky -- he says it happened his way, it happened his way. His hand, his hand can't go in there. Very nice for an attorney to stand here with a big hand and try to put his hand in here. What about a 12-year-old's hand? Very nice to say, "Oh, it's cut evenly now. Look at it now. It is cut evenly." It wasn't cut evenly when he got into the hospital. You heard the description of the doctor. Do you remember? He had to do it twice, to debride it and even it off.

That's the kind of argument you have to listen to. I sat here during the trial. They don't bring in documents. They don't bring in payroll records. They don't bring in witnesses. They don't bring in people who worked there. What are they talking about during the trial? I sat there and I said, "What's going on?" "Mr. Gokay, when you mash tomatoes, don't you take the pits out first?" I sat there in amazement. What kind of cross-

examination is this of Mr. Gokay. Chucky shouldn't win this case because Mr. Gokay didn't pick the pits out of all the tomatoes.

What kind of defense do we really have in this particular case? We had no defense. We had the theory that ends up at the time of summation in Mr. Bartlett's mind, and you talk about credibility. Let's go back to Marcantonio in terms of credibility. What does he say? Very important, that he was working there, and then the other issue we will get to later, in terms of what he was talking about before, in terms of being a true employee, and that's important, that's very important. If he is a true employee, he is out the window too.

Let's see what we are talking about. Marcantonio. He denies he was working there. I don't think Mr. Bartlett, when he stands there -- he never even tells us that his own -- he is telling us that he is working there. His client sitting back there is saying, "I don't know the kid. He wasn't working there." "Didn't he work there before? Wasn't he paid?" "I don't remember." Let's listen to the testimony of the defendant. You are talking about credibility, who to believe.

As I said, in terms of the accident, it really doesn't matter how it happened, because if he was working

there as Mr. Bartlett said it happened, the defendants are responsible. If he was working there the way Chucky said it happened, the defendants are responsible. So the one issue he sums up on with respect to this case really doesn't matter.

Let's just talk about credibility. You remember the questions with respect to the pot washer and cook, in terms of the boy working there? Remember we asked him back in August of 1975,"Was there a pot washer and cook?" He said "Yes." "Give us his name." "I will give you their names." This is back in August, 1975.

We send him the transcript. "Sign the transcript, send it back. Give us the names of the pot washer and cooks." Never happened. Remember I had him on the stand? "Mr. DiMarcantonio, where is the transcript? Did you ever give us the names?" "The transcript is back in the restaurant." Over a year later, the transcript is still back in the restaurant. Never told us who the assistant chef and pot washer was. "Did you tell your lawyer who they were?" "Well, the first time I found out about it, Tommy." Now he sayd "Tommy." "When did you first tell your lawyer about it?" I was supposed to know back in August of 1975. At the time of trial he says, "Tommy was the pot washer and we didn't have an assistant chef."

In August, 1975, he said they had an assistant chef. He was going to give us their names.

Credibility? Is this the kind of person you want to believe, who tells us: One, he wasn't working there; who tells us that he had an assistant chef and cook. "Give us the names." Then he doesn't remember and then he forgets conveniently the transcript back in Pennsylvania. Is this the kind of a defendant you want to give a verdict to, who tells us these kinds of things, who conveniently leaves things back in Pennsylvania? Credibility.

So that on June 17, 1973, Father's Day, when Chucky comes to the restaurant -- is he saying that Chucky is lying about that? Chucky comes to the restaurant. He has a conversation with DiMarcantonio, and he says, "Mr. DiMarcantonio, can I cut the lawn?" And DiMarcantonio says "Yes." Do you remember? I am not going to go through the whole deposition transcript. I read it into evidence, but you listen to those answers, you know: "To the best of my recollection, I don't remember." This is DiMarcantonio "Didn't you have a conversation with Chucky that he asked you to cut the lawn and he was working there?" "To the best of my knowledge, I don't remember." This is through the whole deposition, this fading knowledge, remember

things he wants to remember, not remember things that hurt him.

The boy was working there, Tommy was working there, Bryan was working there. The mother had a conversation with him. He doesn't -- "To the best of my recollection, I don't recall" -- where she complains. He testified she would call up and say, "It's a heavy day, Father's Day."

Let's go back a little bit more in terms of credibility. He says, "I didn't need extra help that day." June 17th, Father's Day. He says it was a summer season kind of thing. To me, the summer begins after Labor Day. It begins after next week. Everyone moves out to their summer home. They move out to that area of Pennsylvania where he lives. They start frequenting the places on weekends. For the very reason he said he didn't need a pot washer or an assistant chef doesn't exist.

I could go down chapter and verse with respect to this deposition, with respect to his testimony on the stand, chapter and verse, of inconsistencies. I am not going to say "lies." That's up to you to determine. Inconsistencies, fading memory, wanting to forget things he wants to forget. When you talk in terms of credibility, there is no credibility in terms of Mr. DiMarcantonio. His

own attorney doesn't believe him. He gets on the stand and says the boy wasn't working there. He gets up before you 10, 15 minutes ago, and says, "The boy was working there. He was working the machine." His own attorney doesn't believe what he has to say. We should believe him? You should believe him?

I don't think there is anyone in this courtroom who denied the fact that he was working there. I don't even think DiMarcantonio could deny the fact that he was working there. It would be very nice for him to come in, bring their records, show the records, bring in some of these other people who were involved in the restaurant. He didn't come in and say the maitre d', the waiters, the waitresses, the bartender -- all these people are gone? Who has control of all these people? I don't know. It is his restaurant. They are his employees. He could have brought at least one of them in to verify his story that they didn't work there.

That's why his attorney, in his summation, ends up admitting that he worked there, because if he didn't, he would look like a fool in front of you in terms of whether or not the boy worked there. Very important he worked there. The child labor law: he worked there, the defendant is responsible. He never told you about that

law in his summation. Why should he tell you about that? That alone would prove liability against his client.

Listen to the Judge when he charges the child labor law and the effect the child labor law has when you have a 12-year-old boy working there. Forget about how the accident occurred. What did his mother say? What did his father say in terms of how the accident occurred, in terms of this boy? The boy didn't want to talk about it. The boy couldn't talk about it. He had lost the four fingers of his hand. When he slipped, and I believe the boy, whether he slipped and grabbed onto this -- and it isn't impossible -- Mr. Bartlett believes it can't happen. 5-2--this thing is a certain height. But it really doesn't matter how the accident happened, because if he was working there as Mr. Bartlett concedes, that's it. That's the end of the ball game.

Let's go on the other issue, which is very important to this case, which the Judge will charge you on, in terms of whether he was a true employee, a true employee. We talk in terms of -- we use words. You have 16 definitions of words. "Employee." You go to the encyclopedia, the dictionaries. We are talking about words of art in this particular situation, in terms of a true employee, because if he was a true employee that day,

his case is out the window. If he was working there, he is in. The defendant is responsible for the injury. But if he was a true employee working there, he is out; this case is out the window.

It is my contention, and again our friend fudges over this little thing, he fudges it over; he doesn't want to get to the issue -- I don't blame him for wanting not to get to the issues, if I had his representation of his client, because he was not a true employee. He was not a true employee because -- why? He comes there and he comes there on a casual basis. He is not there -- his father works there as an employee; he is there six days a week; certain hours, five to eleven o'clock at night during the week, on Sundays it is eleven in the morning to five at night, whatever, eleven at night; that to me is a true employee.

His father is on the books. When you are on the books--and, again, he had the opportunity to bring in the books to show he was a true employee; that this was a boy being paid on the books, his father was on the books--and what happens when you get paid on the books? You take out social security, FICA; you take out various taxes, federal taxes; if there is a state income tax, you take out state income taxes. You take out various deductions

for various reasons. If the person works -- if that particular job is a union job, there are union dues, possibly, that kind of thing. You had none of that in this particular situation. You have a boy who comes sometimes to mow the lawn and you give him a couple of bucks. Here. That isn't a true employee. If he was a true employee, this boy goes home without any money. He would come; he would work.

What happened this particular day? He came. He said, "Mr. DiMarcantonio, can I mow the lawn?" He said, "Yes, go ahead." He goes back in the restaurant and he says, "I want to make some more money. What else can I do?" "Why don't you clean out the refrigerator." At the end of the day, like happened in the past, DiMarcantonio would say, "What did you do? Here are a couple of bucks." That kind of casual activity is not what you and I know to be an employer-employee relation, a true employee. If he is a true employee, this boy is out the window. They had the opportunity to prove that he was a true employee.

Did they put one witness on the stand to prove that he was really an employee and not just someone going in and doing a little odd job here and there on his own? Did they bring in one witness to prove he was an employee? They had this man sitting here for days. Did he ever get

up on the stand and say he wasn't an employee? As a matter of fact, what did DiMarcantonio say? This isn't an examination, but what did he say? You think back, DiMarcantonio said, not once, not twice, but several times, he was not an employee.

So who has made out the case for the plaintiff in this case? Who has made out the case for the plaintiff? Mr. Bartlett. He conceded he is working there. Mr. DiMarcantonio, he conceded he is not an employee. So the defendants, in their eagerness to win this particular lawsuit against Chucky, conceded the two very elements that make out a case against them. They conceded that he was working there, and I say then, if he was working there, it is obvious, the Judge will charge the law, it is a violation of the child labor law, and that's the ball game, and that he wasn't an employee in the true sense of being an employee. Why? Because DiMarcantonio admits it. He concedes it. He argues it. He won't admit he was working there, but he will admit that he wasn't an employee. He doesn't bring in one document to prove that he was a true employee. He doesn't bring in one witness.

The two elements that make this case a case for the infant plaintiff, violation of the child labor law: he was working there, conceded by Mr. Bartlett; not a true

employee, conceded by DiMarantonio; that establishes liability in this particular case.

You listen to the Judge's charge on the law. Any inference in terms of his own fault has nothing to do wi[illegible] is case. He tried to squeeze it in in his summation. But you listen to the Judge's charge as to what the law is. It doesn't matter if the kid had a magnifying glass and was looking at the tomatoes when he stepped on them. The only thing that matters is that he was working there, he was 12 years old. The child labor law history, preventing the very thing that happened here.

So what are we talking about in terms of damages? It has been my contention from the very first day that this case started that this is not a question of the fault of DiMarcantonio, a defendant whose credibility is tremendous in terms of this particular lawsuit -- and I am obviously being facetious; that really isn't the issue in this case, the liability of DiMarcantonio. You listen to that child labor law. You know that that really isn't the issue. The issue really in this case is how much. That's really the issue in this particular case. It is how much.

When you go to the jury room and after you listen to the Judge's charge, please listen very carefully, because

everything I have said, it is very important, that I can't tell you what the law is, but the Judge has given me a lot of leeway, and Mr. Bartlett has, in terms of what are the key issues on liability. If he was working there, Mr. Bartlett concedes that, if he wasn't a true employee, no deductions, no records, no activities as a true employee, liability. That's it.

Now we go to damages. How do you evaluate that particular injury? You have to look at it because you are going to have to evaluate it. It isn't a pleasant sight to look at it. It really isn't. At the beginning of the summation, I apoligized and thanked you for sitting here listening to this lawsuit and giving it your consideration and giving it the time and effort you have given it. But I am going to have to apologize again, because with respect to damages, with respect to assuming the responsibility you have assumed as jurors, you are going to have to come to grips, fortunately and unfortunately, with respect to putting a number on that injury.

You can't grow the fingers back. Dr. Hsu talked about some kind of rare alternative of taking your toes off and sewing your toes onto your hand. I don't know which is worse, having no fingers on your left hand or having no toes on one of your feet or having toes on

your hand. You are going to have to come to grips. I apologize for having to put this responsibility in your hands. It is an important responsibility, and it is a responsibility that has to be made -- the decision has to be made with respect to putting a value on that particular hand.

How do you do it? What did we talk about in option in terms of putting a value? In terms of this law suit, we spoke about hospitalizations, doctors. You know there has to be only a very little bit of a part of putting an evaluation on this permanent disability. There isn't very much you can do with the loss of four fingers. What are we talking about in terms of special damages? Hospitalizations, possible future hospitalizations. What are we talking about in terms of pain and suffering? A very viable part of any lawsuit, any claim, is pain and suffering. We all -- either burning ourselves or stubbing our toe, we all have experienced pain. Some of us have experienced severe pain, maybe getting our hand caught in a door. We are talking about the pain and suffering that this boy suffered for weeks, for months, for a long period of time after the accident in terms of this particular injury. We are talking about a permanent disability.

If you can just think in terms of the things

that this boy couldn't do, some of which he has learned to do, some of which he can't do in the future; this is all compensible, this is all the things you take into consideration in terms of what is it worth to lose the four fingers of your left hand. What is it worth to a 12-year-old boy who is playing football, who can't play football again, playing end; what is it worth to a 12-year-old boy who is injured in violation of the child labor law, to play baseball, to hold a baseball bat. How do you hold a baseball bat, with one hand? You swing with one hand? Your friends laugh at you.

You don't ask questions of witnesses to be cruel. But, "Chucky, do the boys make fun of you?" "Sure." He is a good boy. He shrugs it off. Just think of one thing. Just think after the accident, did you ever think of trying to tie your shoelaces with one hand and having your other hand just being a stump? How do you tie your shoelaces? This is just one thing. I could go on for hours with respect to all the problems the boy has had, will have, is going to have in the future in terms of what he wants to do, in terms of a trade.

So are we talking about in terms of damages? Very wisely, very intelligently, Mr. Bartlett never even discussed damages with you. You know, avoid the

things that are really important to this lawsuit and hope maybe the jury will go along with my tomato-seed defense. You know, if I get them with the tomato seeds, and if I ask did the husband retire from the Navy; maybe he didn't retire. Who cares whether he retired or didn't retire. What Mr. Gokay did, what he will do, what he might do in the future; what Mr. Gokay, Sr. did or might have done, that day, the day before, the day after, has nothing to do with Chucky Gokay.

Mr. Bartlett would like you to fudge a little bit, avoid the issues, fudge it a little bit. The Judge will charge you. It has nothing to do; if that boy was there in violation of the child labor law, they have to pay. Why doesn't he gear into damages? Because he knows the damages are astronomical. What are we talking about? You people are intelligent people. You know in terms of problems without discussing them what the evaluation of this injury is. Is it worth at least $300,000 to lose those four fingers? Would you like to divide four fingers into $300,000? Is it worth a half a million dollars in terms of that? I am not going to again -- at least $300,000. I am not going to go into evaluating how we evaluate. I think you are intelligent enough to know how to do it on your own.

I really, truly apologize for having to put this burden upon you, but you are going to have to come to grips with the burden of putting a number on this injury. At least $300,000. 450? You people--I am not going to tell you what we are suing for -- you people are going to have to come to grips with that. I apologize for that. As you think about it, as you think about it, you really have a tremendous responsibility, because we are talking about a 14-year-old boy now. We are talking about a 14-year-old boy. The Judge will charge you with respect to life expectancy; how long he expects to live with this disability. At least another 40 years, 30 years, whatever, with this disability, all these problems, day in and day after, with respect to this particular hand.

When you think about this burden, you have to think in terms of: this is it for Chucky Gokay. This is it for him, because if you don't come in today with a verdict for Chucky Gokay, that's the end of it in terms of liability, with respect to liability of DiMarcantonio's restaurant. That is it. If he is not compensated, that's the end of the ball game. He goes through the rest of his life with this disability. So it is a tremendous burden. This is his last chance to recover in terms of this disability, this problem, created -- we are not talking

about negligence.

When I listened to Mr. Bartlett--we are not talking about negligence. What is he mentioning negligence for? The child labor law says if he is working there, that's it, you are responsible. If he is not a true employee, and Mr. DiMarcantonio said he is not a true employee -- for that one, I will take his word for it -- because he couldn't bring in records to prove he was a true employee. He couldn't bring in witnesses. That's it. Negligence isn't an issue here. Working is the issue. Because of that, they are responsible for damages.

Again I'd like to thank you very much for listening to me, for your time in deliberating in this case, and I know you will do the right thing.

Thank you very much.

THE COURT: We are going to take our noon break now and when you come back I will give you the final instructions or charge as to the applicable law. Come back at two o'clock.

Don't discuss the case in the meantime with anyone, including your fellow jurors.

(Luncheon recess.)

AFTERNOON SESSION

2:00 p.m.

(In open court; jury not present.)

THE COURT: I prepared a form containing questions to be answered by the jury. My law clerk is handing copies to you now. I'd appreciate it if you look it over and let me know whether you have any objections to the use of the form.

(Pause.)

MR. BARTLETT: Your Honor, as to No. 2, I think that the one problem is this. There can arise a situation under these facts wherein the boy would be considered trespassing, and if that were true, I think that No. 2 would be too inclusive.

THE COURT: If he was working in or about Marc Antonio's Ristorante, as I will define it, he wouldn't be a trespasser.

MR. BARTLETT: That is correct; if he was working, he wouldn't, your Honor. But if we have a situation wherein the boy came down with his father and then the father directed the boy to do something, that would be the direction of an illegal act by the father which would not be binding on --

THE COURT: If the restaurant owner had knowledge

of the fact that the boy was working there and permitted it, as I will charge, then he is responsible.

MR. BARTLETT: If he had knowledge and permitted it, I have no objection to that.

THE COURT: I will so charge. I will charge that unless the restaurateur, Mr. DiMarcantonio, had knowledge of and permitted the son's working in the restaurant, he is not liable.

MR. NAPOLI: Your Honor, I have no objection to the questions. I would prefer if No. 1 and 2 are inverted. In other words, I would think they first have to find out if he was working there, and then if he was working there, whether or not his status would be that of an employee.

THE COURT: If we do it that way, then they would be answering more questions than is necessary. The way it is set up, if they answer Question 1 "Yes," that's the end of it and they don't go on to Question 2 or 3.

MR. NAPOLI: I would just ask this, your Honor, that within the context of the charge--I don't have all the specifics--if the jury understands that, and I think they should from my summation, that if he is an employee, he could not recover and that would be the end of it.

THE COURT: You told them the applicable law, which was beyond the province of a summation, but you did it

without objection, so I see no harm in using the form as it is now set up and telling them that if they answer Question 1 "Yes," that is if they find that the boy is an employee, they need answer no further questions.

(Jury present.)

THE COURT: Ladies and gentlemen of the jury:

You are about to enter into your final function as jurors in this case, and that is to decide the facts of the case. As I told you before, as members of the jury, you are the sole and exclusive judges of the facts. You alone determine the weight of the evidence and the credibility of the witnesses, and you alone determine what reasonable inferences, if any, should be drawn from the evidence or the lack of evidence in the case. In your determination of the facts, you rely only upon your recollection of the evidence. What I may have said from time to time during the trial or what I say now in these instructions is not evidence in the case. Likewise, what the attorneys said in their opening statements and in their closing arguments, and what they may have said from time to time during the trial is not evidence in the case.

The only evidence on which you should base your verdict is the testimony of the witnesses from the stand, the exhibits which were introduced into evidence, any

portions of depositions--that is, out-of-court testimony, which were read into evidence; and any answers to written interrogatories--that is, written questions, which were read.

Likewise, any objections which were made by counsel or any arguments made in connection with those objections or any statements made by the Court in the course of ruling upon those objections are not evidence in the case. Please don't try to guess or speculate as to my thinking about the merits of the case on the basis of any ruling that I made or anything I may have said in the course of that ruling. These are matters of law which should not concern you at all in your determination of the facts.

Also, please don't be concerned by the fact that I may have asked questions of the witnesses from time to time during the trial. Whenever I asked a question, I did so only because I felt that the testimony might otherwise be left unclear, and I wanted to make it as clear as possible to assist you in your determination of the facts. If I sustained an objection to a question, please ignore the question. If I sustained such an objection after the witness had given a complete or partial answer, disregard whatever the witness may have said in that answer. If I instructed you to disregard something that was said, either

by one of the counsel or by a witness or even by myself, then put it completely out of your mind in your determination of the facts.

As jurors, you should perform your duties logically and without emotion. You should not allow sympathy for one side or prejudice against the other to influence your decision in any way. Your verdict should be based upon the evidence in the case and not upon speculation or conjecture, although, of course, you are permitted to draw reasonable inferences from the evidence or the lack of evidence in the case. You should consider both the direct evidence and circumstantial evidence.

Direct evidence is evidence which comes from a witness who saw or heard or felt a thing, or it may come in the form of an exhibit. In other words, it is information which a witness acquired directly through his own senses or which is represented by a document or a physical exhibit which you may inspect yourself and determine at first hand what it is or what it says.

Circumstantial evidence, on the other hand, is proof of one fact at issue by proof of another fact which has such a logical relation to the first fact as to tend to lead the mind to the conclusion that the first fact exists.

The law makes no distinction between the weight to be given direct evidence and that to be given circumstantial evidence. Both should be considered by you in determining your verdict.

As I suggested a moment ago and as counsel have already indicated, you will be called upon to determine the credibility -- that is, the believability, of the witnesses. In determining the credibility or believability of a witness and the weight to be given their testimony, you should consider a number of factors, including whether the person who was giving the testimony was in a position to have personal knowledge of the facts about which he testified.

You should also consider whether his story was plausible; that is, whether it made common sense. You should also consider the extent to which his testimony was corroborated or reinforced by the other evidence in the case and the extent to which it was contradicted by other evidence in the case.

You should also consider whether the witness has an interest in the outcome of the case; that is, did he have any motive for falsifying or slanting or exaggerating his testimony.

You should also consider the demeanor of the

witnesses; that is, how they behaved on the stand. Did they appear frank and forthright or were they shifty and evasive? Did they appear to try to shade the testimony in their favor or to make a particular point?

To sum up, in determining whether a witness is worthy of your belief, you use your common sense just as you would in evaluating statements made to you by persons in your everyday life, including your business life. To use a colloquial expression, "you size the person up": Does he seem worthy of your belief or does he seem untrustworthy?

If you find the testimony of a witness has been disproven and that he knowingly testified falsely about a particular fact, it will be up to you to decide what weight should be given the remainder of his testimony. You may decide that because he testified falsely as to one fact, you should disregard all the rest of his testimony. On the other hand, you may decide that even though he testified knowingly falsely as to one fact, you are inclined to and do believe some or all of the remainder of his testimony. It is entirely up to you to determine the effect that one instance of proven falsity or even a number of instances of proven falsity have on the believability of the witness.

The rules of evidence ordinarily do not permit

a witness to testify as to his opinion or conclusion, but one exception to this rule is the testimony of expert witnesses, including medical doctors. However, the weight to be given the testimony of a medical doctor, like the weight to be given the testimony of any witness, is up to you, the jury, to decide; and in evaluating the weight to be given such expert testimony, you follow exactly the same procedure you would follow in evaluating the testimony of any other witness.

To have evidentiary weight, the opinion of an expert witness must be based upon proven facts. If the witness is asked what is called "a hypothetical question," that is a question which is based on an assumed set of facts, you need not and should not give any weight whatever to his opinion unless all of the presumed facts have been established by the evidence.

When I talk about the weight of the evidence, I don't mean the number of witnesses. I am really talking about the quality of the evidence, its convincing nature: Is the evidence on one side more believable, more convincing, than the evidence on the other side, considering the quality of the evidence, not the number of witnesses who testified or the length of time they spent on the stand.

In this, as in every case, the plaintiff, having

brought the suit, has the burden of proof with respect to all of the essential elements of his case. This means that he must prove each of these elements by a fair preponderance of the credible evidence. Proof by a fair preponderance of the credible evidence simply means that considering all of the evidence in the case, you are inclined to believe the facts in question more than you are inclined to disbelieve them.

If the evidence is equally balanced between evidence tending to prove a fact in issue and evidence tending to disprove it, then you must find against the party who has the burden of proof as to that issue, for he will have failed to carry his burden of convincing you by a preponderance of the credible evidence. In other words, he will have not established the point by the preponderance of the evidence.

If, on the other hand, the evidence in the case bearing on a particular issue tends to prove that fact more than it tends to disprove it, then as to that fact the party who has the burden of proof will have carried his burden of proof, because he will have established that fact by a preponderance of the evidence. Again, preponderance of the evidence refers to the quality of the evidence and not the number of witnesses or the length

of time they testified.

In this case the plaintiffs have alleged that the infant plaintiff, Clarence Gokay, Jr., was injured as a proximate result of working in or about the premises of Marc Antonio's Ristorante on June 17, 1973. There are several issues of fact that you will have to decide.

The first issue of fact that you will have to decide is whether or not the plaintiff was an employee of Marc Antonio's Ristorante. When I refer to the "plaintiff" I am referring to the infant plaintiff, Clarence Gokay, Jr. The reason why you have to determine that is that under the Pennsylvania workmen's compensation law, which is applicable here, the plaintiff cannot recover for an injury sustained in the course of his employment. His sole remedy is under the workmen's compensation law, and he would have to proceed by a claim under that law instead of by bringing a suit in this court. That law is applicable if the plaintiff was an employee and if the injury was sustained in the course of his employment.

First you will have to determine whether or not Clarence Gokay, Jr. was an employee of Marc Antonio's Ristorante on June 17, 1973. An employee is a person who performs services for another in exchange for a valuable consideration, exclusive of persons whose employment is

casual in character and not in the regular course of an employer's business. Let's break that down and define some of the words in that definition.

I referred to services performed for another. In the context of this case, a service is the performance of labor for the benefit of another.

I also used the expression "valuable consideration." Valuable consideration is not limited to money. It may refer to the payment of a wage or a gratuity or stipend, but it doesn't necessarily do so. It may include any benefit, however, small, which is derived by the plaintiff himself or conferred upon a third party whom plaintiff wishes to confer a benefit upon. However, the valuable consideration must be conferred in exchange for the plaintiff's performance of services.

I said that "an employee" excluded persons whose employment is casual in character and not in the regular course of business. Note the word **"and" that I used. In** order to be entitled to this exception, a plaintiff must establish both that his employment was casual and that it was not in the regular course of the employer's business. An employment is casual only if it is infrequent and irregular. An employment is not casual if it relates only to a single or special job that is not of an emergency or

incidental nature, but rather represents a planned project and the tenure of service necessary to complete the project is of fairly long duration.

However, if a person is employed only occasionally at long and irregular intervals for limited and temporary purposes, the hiring in each instance being a matter of special engagement, such employment is casual. The term "casual" is often regarded as the equivalent of such terms as "occasional," "incidental," "temporary," "haphazard, and "unplanned."

Now let's look at the expression "regular course of business." This expression refers to the habitual or regular occupation by which the employer earns his livelihood or obtains some other gain. The term refers to normal operations that regularly constitute the employer's business. It excludes incidental or occasional remodeling or repair of the employer's premises.

In this case, the exception will apply only if you find both that the employment was casual and you further find that the employment was not in the regular course of the employer's business. You will have to determine whether cleaning the refrigerator, for example is in the regular course of the employer's business, if you find that is what Clarence Gokay, Jr. was in fact

doing at the time or at about the time of the accident. If you find that he was working in the regular course of the employer's business in doing whatever he was doing at or about the time of the accident, then you cannot find that he is thus disentitled to compensation and you can disregard that part of the definition and consider only whether he is an employee in the sense of performing services for another in exchange for a valuable consideration.

If you find that he was working in the ordinary course of the employer's business and you further find that he was performing services for another in exchange for a valuable consideration, then, of course, you will find that he was an employee and that he cannot recover because his exclusive remedy would be under the workmen's compensation laws.

If, on the other hand, you find either that he was not performing services for another in exchange for a valuable consideration or that his work was both casual and that it was not in the course of the employer's business, then you will find that he is not barred from recovery for that reason, and then you will proceed to the next issue in the case.

That issue is one which is raised by what might

be referred to briefly as "The Child Labor Law of the State of Pennsylvania."

The applicable law provides that no minor under 16 years of age shall be employed or permitted to work in, about or in connection with any establishment or in any occupation. It further provides that no minor under 18 years of age shall be employed or permitted to work in, about or in connection with any establishment where alcoholic liquors are sold or dispensed.

I charge you that in connection with your consideration of whether these statutes were violated by the defendant, it is undisputed that at all relevant times the plaintiff was a minor under 16 and that the defendant restaurant was an establishment within the meaning of the statutes. For purposes of determining whether the defendant violated these statutes, it is not necessary for you to find that the plaintiff was employed according to the definition of "an employee" that I gave you a moment ago; rather, the defendant will be held to have violated these statutes if you find that the plaintiff was permitted to work in, about or in connection with the defendant's business.

It does not matter whether or not the plaintiff's work was casual and/or whether it was outside the regular

course of the defendant's business. It does not even matter whether or not the plaintiff performed work for a valuable consideration, so long as you find that the plaintiff performed work in, about or in connection with the defendant's establishment; that the defendant was aware of the work and permitted it; and that the work done by the plaintiff in, about or in connection with the defendant's establishment was a proximate cause of the plaintiff's injury.

I am going to reiterate those three things that you must find to find the defendant liable under the child labor laws:

First, you must find that the plaintiff performed work in, about or in connection with the defendant's business

Second, you must find that the defendant, Mr. DiMarcantonio, was aware that the plaintiff was working there and permitted it.

Third, you must find that the work which the plaintiff was doing at the defendant's establishment was a proximate cause of the plaintiff's injury.

A proximate cause means this: One thing is the proximate cause of another if it is a substantial factor in producing the other. In other words, you must determine whether the injury which the plaintiff suffered on June 17,

1973 was produced by his working in, about or in connection with the defendant's p[illegible]ises, in whole or in part. In other words, was such working a substantial factor in producing the plaintiff's injury?

The negligence, if any, of the infant plaintiff is not a defense to an action under the child labor laws. Even though the defendant may have been careless, that would not prevent his recovery against the defendant if you find those three elements that I mentioned before, which are requisite to recovery under the child labor laws. I should have said, if the plaintiff was careless. I am sorry. I am not suggesting that he was. I am not suggesting that he was not. I am simply telling you that in an action to recover on the basis of the child labor laws, it makes no difference whether he was careless or whether he was not.

You still must find the three things I indicated, that is, that he was working in, at or about or in connection with the defendant's place of business; secondly, that the defendant knew of it and permitted it; and, thirdly, that such working was a proximate cause--that is, it was a factor in producing the plaintiff's injury.

Those are the two issues you will have to decide. Was he an employee? If you find that, of course,

you will have found that he cannot recover in this suit, that his sole recovery would be under the workmen's compensation laws.

If you find that he was not an employee, then you must proceed to the next question and determine whether or not he is entitled to recover under the child labor laws which involves those three determinations which I just gave you. Suppose you find that he is entitled to recover under the child labor laws. You will then have to determine what amount of money will fairly compensate him for the injury he sustained as a proximate result of working around the defendant's premises.

By talking to you about the question of damages, I do not mean to suggest that I believe you should find the plaintiff is entitled to recover anything. I am instructing you about how to compute damages in the event you find the plaintiff is entitled to recover. Then, of course, in that event, you must know how to go about determining the amount of damages. But do not allow the fact that I have to instruct you about how to compute damages to convince you that I believe the plaintiff is entitled to recover damages.

There are several elements which you should consider in determining the amount of damages which will

fairly compensate plaintiff for his injuries:

The first of these is pain and suffering. If you find that the plaintiff is entitled to recover under the child labor laws, your verdict should include an amount of money which you find will fairly compensate him for his conscious pain and suffering as a proximate result of the injury. He is entitled to recover an amount of money which will fairly compensate him for the conscious pain and suffering. Obviously, it is very difficult to arrive at such a determination. I cannot give you any specific yardstick that you can apply. You will have to use your own common sense and experience in determining what would be fair compensation for that element of the damages.

In addition, your award of damages should include as an element, the loss of bodily function and activity. What amount of money will fairly compensate plaintiff for the extent to which his bodily functions and his normal activities have been interfered with because of the injury he sustained? In that connection I point out to you that Clarence Gokay, Jr. is now 15 years of age and according to the mortality tables has a life expectancy of approximately 55 years. Such statistical tables represent nothing more than arithmetical averages of life expectancy. They do not assure that a person

will actually have that span of life. You will have to determine from all of the evidence available to you what the plaintiff's life expectancy is, taking into consideration such factors as his state of health, his way of life and all of the other factors disclosed by the evidence which might affect a person's life expectancy.

If you find that the plaintiff is entitled to recover, your damages should also include as an additional element any mental suffering, including emotional and neurological disturbances, which result from the injury.

As a fourth element, the plaintiff is entitled to recover, if you find that he is entitled to recover under the child labor laws, the reasonable and necessary expenses for medicines and medical services, including doctors' charges, nursing charges, hospital expenses and X rays. If you find that the plaintiff will have to undergo further treatment or hospitalization, then, of course, your figure for hospital and medical expenses will include such additional expenses as you find might reasonably be necessitated in the future.

Finally, if you find that the plaintiff is entitled to recover, your computation of damages should include as an element an amount to compensate him for loss of future earnings that he might be expected to suffer as

a result of the injury. His loss of future earnings should be determined on the basis of all of the evidence available to you, including his present condition of health, his future employment prospects, the extent to which his employment prospects have been diminished by his injuries, the length of time which you find he might reasonably be expected to work had he not been injured, and any other circumstances disclosed by the evidence bearing upon his earning expectancy and the extent to which his earning expectancy has been diminished by his injury. In that connection, I point out to you that at his present age of 15 years, the plaintiff has a work expectancy of -- this can't be correct.

(At the side bar.)

THE COURT: It is the same as the life expectancy, so it cannot be right. You have him working for 55 more years.

MR. NAPOLI: Can we concede that it would be until at least age 65?

MR. BARTLETT: No.

MR. NAPOLI: What do you say his work expectancy is?

MR. BARTLETT: I say his work expectancy isn't relevant.

THE COURT: He is eligible for social security at, what, 62? I will charge 62. Is that agreeable?

MR. BARTLETT: Yes, sir.

MR. NAPOLI: Yes, your Honor.

(In open court.)

THE COURT:--a work expectancy of 47 years.

Again I caution you that such tables are nothing more than a statistical average. They do not assure that the plaintiff will actually have that working span. He may have more; he may have less. And it will be up to you to determine what his actual work expectancy is, considering all of the evidence available to you.

When you get to the jury room to begin your deliberations, I am sure you will find that you begin with many differing points of view. The purpose of your deliberation is for each of you to participate and to express freely your points of view while keeping an open mind and listening thoughtfully and receptively to the points of view expressed by your fellow-jurors. Just because you take a particular position at the outset of the discussions, please don't feel that you have to justify that position or stubbornly defend it. Don't be too proud to change your point of view after hearing those of your fellow-jurors.

Keep an open mind and try to see if after hearing what your fellow-jurors are saying you cannot reach a common ground where you can all agree and where you can all conscientiously say, "This represents our collective point of view." I don't mean to say that you have to give in and yield a position that you should conscientiously believe in merely because you are outnumbered. I am merely urging you not to be too proud or too stubborn to change your point of view during the course of the deliberations.

Try to arrive at a single verdict which represents the conscientious point of view of each and every one of the six deliberating jurors, if that is at all possible. The verdict of the jury must be unanimous. That is, it must represent the conscientious point of view of all six of the deliberating jurors. You may find that you have some difficulty in remembering some of the evidence in the case or that you have differing recollections of the evidence. If you want to hear any of the evidence again, if you will send a note out to me through the marshal, who will be stationed at the door of the jury room I will be glad to have the reporter read the pertinent part of the record from his notes.

Likewise, if you want to have any of the exhibits

in the jury room for your inspection during your deliberations, simply send out a note to me and those exhibits will be sent in. We might make one possible exception in the case of the big machine, and perhaps we can agree with counsel that you be permitted to come out here and look at it, if you want to. The part of the machine that represents the grinding attachment will be readily portable, will be available for your use in the jury room, if you request it. The same goes for any of the other exhibits.

If you can't remember anything I said in the charge or if I have failed to discuss anything or if I have left anything unclear, send a note out to me and I will be glad either to amplify the charge or to explain it.

In order to help you in your deliberations, I have prepared a list of three questions. These will help remind you of the things that I said during my charge. It is entitled "Questions to be Answered by the Jury."

"One. Was Clarence Gokay, Jr., an employee of Marc Antonio's Ristorante on June 17, 1973? There is a blank and below that in parentheses, "Yes or No." So the jury will try to arrive at a unanimous "Yes" or "No" answer, and if they can, they will place that answer in the blank. Following that question there is this statement in parentheses:

"If the answer to Question 1 is 'Yes,' no further questions need be answered."

You may recall I told you that if the jury finds that Clarence Gokay, Jr. was an employee of the restaurant on the date in question, his exclusive remedy would be by a claim under the Pennsylvania workmen's compensation laws and he could not bring a further action in this court. So if you answer that question "Yes," you need go no further because that will be the end of the case.

Question 2 reads:

"Was Clarence Gokay, Jr. injured as a proximate result of working in or about Marc Antonio's Ristorante at the time of the accident on June 17, 1973?" There is a blank for you to write in "Yes" or "No." In order to answe that question "Yes," you have to find two things:

One is, you have to find that Clarence Gokay, Jr. was working in or about Marc Antonio's Ristorante at the time of the accident; and, second, you must find that he was injured as a proximate result of such work. Only if you find both that he was working in or about the restaurant at the time in question and that he was injured as a proximate result of such work, can you answer that ques "Yes." Below that question there is this statement in parentheses:

"If the answer to Question 2 is "No," no further question need be answered." The reason, of course, is that if you find that he either wasn't working in or about the restaurant or that he wasn't injured as a proximate result, there can be no recovery on the basis of the child labor law. However, if you answer Question 1 "No" and Question 2 "Yes," then you will answer Question 3, which reads:

"What amount of money will fairly and reasonably compensate Clarence Gokay, Jr. for the injury he sustained on June 17, 1973?" Then there is a blank with a dollar sign for you to write in the amount. I remind you again that in putting this question on the questionnaire and in charging you about how to determine the amount of damages, I do not want you to infer that I am of the opinion that the plaintiff should recover. That is up to you to determine and only if you determine that he should recover by answering Question 1 "No" and Question 2 "Yes," need you be concerned about how to compute the damages.

If you do answer those questions as I indicated, then in determining the amount of money which will fairly compensate the plaintiff Clarence Gokay, Jr. you will consider those elements that I mentioned before; that is, the pain and suffering, the loss of bodily function and

activity, the hospital and medical expenses, the loss of income and the mental and emotional suffering, if any.

By charging you all five elements, I don't mean you should necessarily find all those elements. I mean you may find there was conscious pain and suffering.

I will ask the clerk to hand, please, to the forelady, the questionnaire. The first juror chosen is normally the foreman or forelady, but if he or she decides that he or she does not want the job, would prefer not to have it, they may decline it and then you may select one of your number to serve the function of presiding at your deliberations and making the report of the jury's verdict.

I will see counsel in the robing room, please.

(In the robing room.)

THE COURT: Any suggestions or exceptions other than those that have already been noted?

MR. NAPOLI: Just one, your Honor. I just except to your Honor's telling the jury about the existence of the workmen's compensation -- the Pennsylvania workmen's compensation law.

THE COURT: I can't believe that, because you told them about it in your summation.

MR. NAPOLI: I never mentioned workmen's compensation law.

THE COURT: You did say if they find he is an employee, that's the end of the ball game.

MR. NAPOLI: Yes, your Honor, I did say that. That's all, your Honor.

MR. BARTLETT: I would respectfully except to only two aspects of your Honor's charge not previously noted:

Firstly, I would respectfully except to that aspect of the Court's charge where you indicated that the jury may consider a loss of future earnings. I do so on the grounds that there has been a failure of proof on the plaintiff's part as to that aspect.

Secondly, I except to that aspect of the Court's charge which indicated that the jury may consider emotional and neurological disturbances, firstly, on the grounds that the plaintiff has failed to adduce any evidence on the question of neurology. Secondly, on the question of emotional disturbances, there has only been lay testimony by the mother and no expert testimony as to that.

THE COURT: What was that last?

MR. BARTLETT: The only question as to emotional disturbance has been from a lay witness, the mother, and there has been no expert testimony on that aspect.

THE COURT: I will tell them to disregard what I

said about neurological disturbance, because I believe you are right, there is no evidence as to any neurological disturbance, other than pain and suffering.

I also think that in discussing the questionnaire point 2, I omitted the element of knowledge and acquiescence, and I think I should clarify that.

MR. NAPOLI: Your Honor did charge that.

THE COURT: I charged it earlier, but I left it out when I was discussing the questionnaire, and I think that might be misleading.

MR. BARTLETT: The only request I do have, your Honor, is that the Court instruct the jury that a valuable consideration is not determined by the amount of money, if any.

THE COURT: I said that. "However small," is what I said.

MR. BARTLETT: If you did, your Honor, so be it I just didn't hear it.

(In open court.)

THE COURT: In referring to one element of the damages I used the expression "emotional or neurological disturbances." I should have said "emotional or psychological disturbances." There is no evidence of any nerve damage other than would necessarily be involved in the amputation

of fingers. You will have to determine whether or not there is any emotional or psychological damage and determine what amount of money will fairly and reasonably compensate for that, if you find that there is such damage.

One other thing I perhaps should clarify, in discussing the second question on the questionnaire, which reads:

"Was Clarence Gokay, Jr. injured as a proximate result of working in or about Marc Antonio's Ristorante at the time of the accident?"

I told you that in order to answer that question you would have to determine both that Clarence Gokay, Jr. was working in or about the restaurant at the time in question and that his injury was the proximate result of such work. As you may recall from an earlier part of my charge, I should have said again that unless the plaintiff Clarence Gokay, Jr. was working in or about Marc Antonio's Ristorante with the knowledge of and with the permission of the defendant-owner, Mr. DiMarcAntonio, then there can be no recovery under the child labor law.

So in order to answer Question 2 "Yes," you must determine that Mr. DiMarcantonio knew that Clarence Gokay, Jr. was working in the restaurant and that he permitted such work.

Do you understand?

As a matter of fact, if I may have the form back, with the consent of counsel, I will write into the form the expression, "With the knowledge and acquiescence of Mr. DiMarcantonio." So the questions now reads:

"Was Clarence Gokay, Jr. injured as a proximate result of working in or about Marc Antonio's Ristorante with the knowledge and acquiescence of Mr. DiMarcantonio at the time of the accident on June 17, 1973?"

So you will have to determine three things in order to answer Question 2 affirmatively: One, was he working there; two, was he doing so with the knowledge and acquiescence of Mr. DiMarcantonio; three, was his injury the proximate result of such work.

Let's excuse the two alternate jurors. I want to thank you very much for bearing with us, Mrs. Murray and Mr. Rodriguez. As you understand, you served a very useful purpose because if any of the other jurors had to be excused for any reason, we didn't want to have less than the full complement of jurors so we would have to try the whole case all over again. It turned out, fortunately, that it wasn't necessary because nobody got sick or had to be excused for any reason. We very much appreciate the careful attention that you showed. You are both discharged.

(One marshal was duly sworn.)

THE COURT: I might tell you, since it is now about 3:10, that you need not feel under any time pressure in reaching your verdict. This is an important case, and I will not keep you late at night. If by the time, let's say, six o'clock comes around, you haven't reached a verdict, I will let you go for the evening. You can come back at ten o'clock in the morning and resume your deliberations. So don't be worried about being kept late at night so that you will feel unsafe going home. If you don't reach a verdict by that time, you can simply come back in the morning and resume your deliberations.

(At 3:12 p.m., the jury retired to commence their deliberations.)

(At 3:29 p.m., Court Exhibit 2 was marked. Court Exhibit 2 reads as follows:

"All the pictures in evidence, the grinding attachments, tape ruler.")

(At 5:15 p.m., in open court; jury not present.)

THE COURT: I am in receipt of a note from the jury which reads as follows:

"1. Please clarify whether Mr. Marcantonio was aware and gave his permission for Chucky to work in the kitchen on June 17, 1973.

"2. Is this case covered by owner's insurance?"

With respect to Paragraph 1, your guess is as good as mine what the jury wants. This, of course, is something for them to determine, and I don't know whether they want me to repeat my charge with respect to knowledge and acquiescence in Chucky's working in the restaurant or what it is that they want.

MR. NAPOLI: Your Honor, I would make the suggestion that you could in a sense marshal the evidence in terms of: It is plaintiff's contention he was working and that his testimony was that on the day of the incident he spoke to Marcantonio and asked if he could mow the lawn; that there was testimony by Tommy, Mrs. Gokay, et cetera, et cetera, that prior thereto, so and so, and that defendant denies that. There was the testimony that he came into the kitchen from time to time.

THE COURT: I'd be afraid if I started to marshal the evidence I would make everybody unhappy, including you.

MR. NAPOLI: Then I think the answer would be just to repeat the three elements.

THE COURT: I will ask them if that is what they want, for me to repeat the charge. If that satisfies them, fine. If they want the testimony reread, it will

just have to be reread, I suppose.

MR. BARTLETT: As far as No. 2 is concerned, I think we are all in agreement that that cannot be answered, your Honor.

THE COURT: I will tell them that there is no testimony as to insurance being in the picture and as far as they are concerned the defendant is personally liable and will be liable for any judgment.

Any objection?

MR. BARTLETT: No.

MR. NAPOLI: That was my problem before in terms of mentioning workmen's compensation. That's why in my summation I didn't say -- I said if he was an employee he would be out of court.

THE COURT: That's why I didn't think it was proper for you to say that. You should not have mentioned that. You were telling them about the law. It was grossly improper for you to do that, and I tried to overcome the difficulty by telling them that this would simply mean that the plaintiff would be relegated to its rights under the workmen's compensation law.

MR. NAPOLI: I think maybe the answer would be that"In any respect you shouldn't consider insurance." We might cover that aspect of workmen's compensation insurance.

Juror No. 1, in answer to your Honor's question, is pretty knowledgeable in terms of insurance law. I would think that they should be told that, in any respect, they shouldn't consider insurance.

MR. BARTLETT: I think the question --

THE COURT: I think that's proper. I think I will tell them that. I will simply tell them that they should not consider whether or not the owner has any insurance of any kind.

MR. BARTLETT: I have no objection to the train of that thought, your Honor. I think perhaps in those words it almost infers that he does, but you shouldn't consider it. But certainly that approach, I have no objection to.

THE COURT: All right. I think I can work it out where it will be satisfactory.

MR. BARTLETT: As to No. 1, your Honor, have we reached a determination as to how that will be approached?

THE COURT: I am going to repeat my charge as to the three elements and see if that's what they want. If it isn't, then we will have to find out what they do want. I don't know any other way to do that than simply ask the foreperson without making us privy to what the jury has said up to now, to state whether or not that's what the

jurors want.

For the record, this note has been marked Court's Exhibit 3.

MR. BARTLETT: Does it have a time on it, your Honor?

THE COURT: 4:06 p.m.

(Note from jury marked Court Exhibit 3.)

(Jury present.)

THE COURT: I have your note. Paragraph 1 of the note reads:

"Please clarify whether Mr. Marcantonio was aware and gave his permission for Chucky to work in the kitchen on June 17, 1973."

Madam Forelady, I don't want you to tell me what the jury has said up to now or what their thinking is with respect to the case. I just want you to answer "Yes" or "No" to this question: Is what you have in mind there or what the jury has in mind a clarification of the portion of my charge wherein I discussed that requirement?

JUROR NO. 3: No.

THE COURT: Can you state as briefly as possible what the jury wants in response to that?

JUROR NO. 2: In Mr. Marcantonio's testimony,

when the three -- Mr. Gokay and his two sons knock on the door, he opened the door, and Chucky said, "Can I mow the lawn?" We would like to know the answer to that and whether or not Mr. Marcantonio was aware that he was going to work in the kitchen after that on that particular day.

THE COURT: With respect to the first part, what Mr. Marcantonio said, do you want that from the testimony of the witnesses themselves? You want that read? Is that what you mean?

JUROR NO. 2: We would like Mr. Marcantonio's reply.

THE COURT: From his testimony?

JUROR NO. 2: Yes.

THE COURT: I think I better speak to counsel about that.

With respect to the second point, as to whether or not Mr. Marcantonio was aware that he was going to work in the kitchen after that, you will have to determine that yourselves from the testimony as you recall it. I don't personally recall any testimony about that one way or the other, that is, that Mr. Marcantonio was aware; but it is your recollection that governs and not mine in that respect.

(At the side bar.)

THE COURT: As I recall it, Mr. DiMarcantonio said that he wasn't aware that Chucky was going to mow the lawn, so he said nothing in response to any such question because he didn't hear any such question, according to his testimony. They want it from DiMarcantonio's testimony, and there is nothing there, obviously.

MR. BARTLETT: I think there is a question by Mr. Napoli, your Honor. I think Mr. Napoli inquired as to whether he knew that Chucky was going to work or that he ever saw him working in the kitchen, and that he answered in the negative. I believe that's on the direct examination of DiMarcantonio by Mr. Napoli. Perhaps the reporter can dig that out.

MR. NAPOLI: Your Honor, in terms -- they are looking for a clarification. There can be an inference, your Honor, from prior practice in terms of what the testimony was, what did the boy do, did, that that could be a factor in determining whether he was aware. I think they are asking for a clarification, and that's where I say there has to be some marshaling of the facts as to what the contentions, at least, were on this. My contention is that the prior practice of him working there, the testimony of him working there in the past, that that would be one factor in terms of knowledge.

THE COURT: You are not asking me to marshal the evidence. You are asking me to summarize your summation.

MR. NAPOLI: But I think it is something they should consider in terms of prior practice and what the testimony was.

THE COURT: I give them what they ask for, and as I recall it, they asked for the testimony of Mr. DiMarcantonio --

MR. BARTLETT: That's correct.

THE COURT:-- on this question of what was said in answer to Chucky's question, "May I mow the lawn?"

MR. NAPOLI: The question was for clarification of the issue.

THE COURT: As explained, what they want is Mr. DiMarcantonio's testimony as to what he said in response to Chucky's question.

MR. NAPOLI: Can you ask them if they want Chucky's testimony?

THE COURT: I don't ask them whether they want anything.

(In open court.)

(Discussion off the record.)

THE COURT: The court reporter tells me that Mr. DiMarcantonio was never asked about that alleged incident

where he let the Gokays in through the door of the restaurant and Chucky allegedly said, "May I mow the lawn." He was asked about whether he had seen Chucky working around the place on various occasions, but they were previous occasions and there was no question which was specifically directed to the alleged incident on June 17, 1973, according to the court reporter.

If counsel wish, they may check with the reporter later, and if they find anything --

JUROR NO. 3: This lady said it might have been Chucky's testimony.

THE COURT: There was testimony by Chucky on this. Do you want to hear that?

JUROR NO. 2: Yes.

(Pause.)

(Record read.)

THE COURT: That's all the testimony of Chucky, apparently, on the conversation that was had with Mr. DiMarcantonio at the time in question.

MR. BARTLETT: Your Honor, may we approach the bench?

THE COURT: All right.

(At the side bar.)

MR. BARTLETT: Your Honor, I found the testimony

the jury was asking about. Mr. Napoli read in parts of the EBT of Mr. DiMarcantonio. I have checked on page 20, the lines asked, and that's exactly what he read in on his direct case, on page 20, starting on line 11 and ending on line 10.

THE COURT: I think that should be read.

MR. NAPOLI: The only questions that answer their question is line 10 -- from line 2 down to line 14, because then the next questions don't relate to what they are asking:

"What time was the accident?"

"I am really not sure."

It would be from 2 to 14.

THE COURT: I don't know why you need line 2.

MR. BARTLETT: I have no objection to lines 11 to 14.

MR. NAPOLI: This is important:

"I'm not sure; I don't recall."

THE COURT: He obviously does. He took him to the hospital.

MR. BARTLETT: 11 to 14?

THE COURT: All right.

(In open court.)

THE COURT: There is some testimony of Mr.

DiMarcantonio which was read into the record from his out-of-court deposition and which becomes part of the record in the case just as if he had given the testimony on the stand here, and that relates to the question whether such a conversation took place, and the reporter will now read the relevant part of that testimony.

(Record read.)

THE COURT: Now we come to Point 2 of your note which reads:

"Is this case covered by owner's insurance?"

I instruct you that you are not to consider the question of insurance at all. You are to operate on the assumption that if the defendant is liable, the judgment will be paid by the defendant personally and that no insurance company will indemnify the defendant for the damages. Likewise, put out of your mind the question of workmen's-compensation insurance.

I told you that only in view of the comment made by one of counsel in their summation in which he said that if you answer the first question as to whether or not Clarence Gokay, Jr. was an employee in the affirmative, that would be the end of the case. I merely wanted to explain to you why it would end this case, but you should not consider either the question of any liability

insurance that the defendant might have or any workmen's compensation that the plaintiff might be entitled to in the event you find that he is an employee.

Does that answer your two questions?

JUROR NO. 4: Yes.

(At 4:45 p.m., the jury again retired to continue their deliberations.)

(Recess.)

(At 5:35 p.m., in open court; jury present.)

(Court Exhibit 4 was marked.)

THE CLERK: Members of the jury, please answer present as your name is called.

(Jury roll called -- all present.)

THE CLERK: Madam Forelady, has the jury agreed upon a verdict?

THE FORELADY: Yes, we have.

THE CLERK: Question No. 1: Was Clarence Gokay Jr. an employee of Marc Antonio's Ristorante on June 17, 1973?

What is your answer.

THE FORELADY: No.

THE CLERK: Question No. 2: Was Clarence Gokay Jr. injured as a proximate result of working in or about Marc Antonio's Ristorante with the knowledge and acquiescence

of Mr. DiMarcantonio at the time of the accident on June 17, 1973?

THE FORELADY: Yes.

THE CLERK: Question No. 3: What amount of money will fairly and reasonably compensate Clarence Gokay, Jr. for the injury sustained on June 17, 1973?

THE FORELADY: $150,000.

THE CLERK: Members of the jury, please listen to your verdict as it now stands recorded. You say your answer to Question No. 1 is "No"; your answer to Question No. 2 is "Yes"; and your answer to Question No. 3 is "In the sum of $150,000." So say you all.

MR. NAPOLI: May I approach the bench, your Honor?

(At the side bar.)

MR. NAPOLI: In all our haste, your Honor, in terms of the confusion on the law, the mother has a cause of action for loss of services, your Honor.

MR. BARTLETT: I think that was merged into the first one when you charged about --

THE COURT: You didn't submit any proposed charges on that. I assumed she was only suing as the guardian of the minor child. You made no exception to the charge in that respect, I didn't charge it. You made

made no objection to the questionnaire in that respect. I think you have waived any such contention. I think we are talking about trivia anyway.

MR. NAPOLI: All right, your Honor. Just note my exception.

(In open court.)

THE COURT: I want to thank the members of the jury for the obvious attention you have paid during the trial and for your apparent care in deliberating to reach your verdict.

It isn't a pleasant thing to do to sit in judgment on the affairs of others. It is also not a pleasant thing to do to give up your own personal business and affairs and come in to court for jury duty, but I think you all understand now, if you didn't before, that our system of justice couldn't operate at all without people like yourself who are willing to forego your own business and personal affairs and devote the time to jury duty and decide the very difficult questions that are presented in cases like these.

So we are all in your debt, and I want to thank you very much.

All of you, I believe, have already had two full weeks on jury duty. You are all discharged with the

thanks of the Court.

(Jury excused.)

MR. BARTLETT: Does your Honor wish motions at this time or shall we submit them later?

THE COURT: If your motion is to set aside the verdict, you better make it now because I don't think there will be an opportunity to make it later.

MR. BARTLETT: Your Honor, at this time the defendant respectfully moves to set aside the verdict of the jury as against the weight of the credible evidence and moves for a judgment notwithstanding the jury's verdict.

THE COURT: That motion is denied.

MR. BARTLETT: Respectfully except, your Honor.

I also move to set the verdict aside as excessive.

THE COURT: That motion is denied.

MR. NAPOLI: Your Honor, I assume that all the motions at the end of the plaintiff's case and at the end of the entire case that your Honor reserved upon are also denied?

THE COURT: Yes.

Thank you.

(Court adjourned.)

Services of three (3) copies of
the within Records is
hereby admitted this 26 day
of August, 197[illegible]

Lipsig, Napoli, Sullivan, Allen & Tsapatsis P.C.
Attorney for plt-app